Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ANCHORAGE EDUCATION ASSOCIATION
and NEA-ALASKA,
Petitioners,

v.

REBECCA L. PATTERSON, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether public employees who are required by an agency-shop agreement to pay an agency fee to a union, and who have refused to submit their objections to the amount of the fee to the impartial arbitrator provided by the union pursuant to *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), may challenge the amount of the fee in an action under 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the Court of Appeals were as follows:

Rebecca L. Patterson	Anchorage School District
Judy O. Weiner	Leland C. Wilson
Andrew J. Rabung	Anchorage Education Association
Adolph Hinson	
Emma L. Smith	NEA-Alaska
Carole Gene Murray	Marjorie Kyle
Robert Christal	

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 6, 7, 10
Bromley v. Michigan Education Ass'n-NEA, 82 F.3d 686 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997) 6
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) ..... *passim*
Clayton v. Automobile Workers, 451 U.S. 679 (1981) 10
Cox v. New Hampshire, 312 U.S. 563 (1941) 14
Hohe v. Casey, 956 F.2d 399 (3d Cir. 1992) 6
Hudson v. Chicago Teachers Union, 922 F.2d 1306 (7th Cir. 1991) 6
Lancaster v. Air Line Pilots Association Int'l, 76 F.3d 1509 (10th Cir. 1996) 6
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 4, 15
Machinists v. Street, 367 U.S. 740 (1961) 7, 9
McCarthy v. Madigan, 503 U.S. 140 (1992) 11, 13
Miller v. Air Line Pilots Association, 108 F.3d 1415 (D.C. Cir. 1997), *cert. granted*, No. 97-428 (1997) ..... *passim*
Patsy v. Board of Regents, 457 U.S. 496 (1982) 12, 13, 15
Poulos v. New Hampshire, 345 U.S. 395 (1953) 14
Railway Clerks v. Allen, 373 U.S. 113 (1963) 8, 11
Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) 14
Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 14

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amend. I ..... *passim*
28 U.S.C. § 1254(1) 2
Civil Rights Act of 1871, 42 U.S.C. § 1983 ..... *passim*
Railway Labor Act, 45 U.S.C. § 151 *et seq.* 5, 12, 15
Alaska Stat. § 23.40.110 3

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PETITION FOR WRIT OF CERTIORARI

Petitioners Anchorage Education Association and NEA-Alaska respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Rebecca L. Patterson, et al. v. Anchorage School District, et al.*, 131 F.3d 807 (December 8, 1997).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 131 F.3d 807, and is reproduced in Appendix A to this petition.[1] The opinions

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[1] This case was consolidated for decision with *Knight v. Kenai Peninsula Borough School District*, 9th Cir. No. 95-35848, and *Jefferson v. Kenai Peninsula Borough School District*, 9th Cir. No.

and orders of the United States District Court for the District of Alaska resolving the parties' cross-motions for summary judgment are unreported and are reproduced in Appendices B and C. The District Court's opinion and order denying respondents' motion for partial reconsideration is unreported and is reproduced in Appendix D. The order of the District Court entering final judgment is unreported and is reproduced in Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 8, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

95-36283. Certiorari is requested only in this case, not in *Knight* or *Jefferson*.

STATEMENT OF THE CASE

Petitioner Anchorage Education Association ("AEA") is recognized pursuant to Alaska Stat. § 23.40.110 (1995), as the representative, for purposes of collective bargaining, of teachers employed by the Anchorage, Alaska School District ("ASD" or "the School District"). AEA is affiliated at the national level with the National Education Association ("NEA") and at the state level with petitioner NEA-Alaska. (The three Associations will be referred to collectively as "the Union.") As permitted by Alaska law, AEA and ASD agreed to a provision requiring that teachers who do not become members of AEA must pay an agency fee. Part of the agency fee is to pay for services provided by AEA; part is to pay for services provided by NEA-Alaska; and part is to pay for services provided by NEA.

To collect the agency fees, and to comply with the requirements of *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), AEA adopted a procedure under which (1) all nonmembers are provided notice of the amount of the agency fee and of the right of nonmembers to object to paying the full fee, together with information explaining, *inter alia*, how the fee was computed; and (2) the fees of all objectors who dispute the Union's determination as to the amount of the fee that lawfully may be charged are held in escrow pending resolution by an impartial arbitrator of any such disputes.

In May 1993, the seven respondent teachers, who were not members of AEA, filed suit under the First Amendment and 42 U.S.C. § 1983, claiming that certain of the procedures followed by AEA in collecting agency fees for the 1992-93 school year did not comply with *Hudson*. Respondents also sought to have the district court determine the amount of the agency fee that lawfully was chargeable to them, despite acknowledging that the arbi-

tration process provided by AEA to resolve that question was in compliance with *Hudson*.[2]

On cross-motions for summary judgment, the district court found that the notice AEA had sent to nonmembers with respect to the 1992-93 agency fee was deficient in two respects: first, the notice used a presumption that AEA devoted at least as great a proportion of its expenditures to chargeable matters as did NEA-Alaska; and second, the breakdown of NEA-Alaska's expenditures into chargeable and nonchargeable categories had not been audited.[3] App. 27a-29a, 39a-40a, 60a. AEA accepted the district court's rulings on those matters and they are not at issue here.[4]

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[2] *See* Transcript of Oral Argument held in the District Court on April 6, 1995, at 16 (argument of respondents' counsel) ("We do not suggest . . . that that procedure fails to meet the requirements of the impartial decisionmaker required by *Hudson*. Clear authority holds that it does.")

[3] We will refer to those union activities which objectors lawfully may be required to support financially as "chargeable" activities; other union activities will be referred to as "nonchargeable." *See generally Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

[4] It should be observed, however, that the district court's determination that these aspects of AEA's notice failed to comply with *Hudson* is questionable. The "local union presumption" was reasonable because, *inter alia*, NEA-Alaska devotes a substantial proportion of its resources to lobbying and certain other nonchargeable activities that commonly are undertaken by statewide labor organizations, while AEA, as a local organization, does not generally undertake such activities. It therefore is a virtual certainty that the proportion of expenditures that may be charged to objectors will be higher for AEA than for NEA-Alaska; if anything, the "local union presumption" *understates* what AEA lawfully could charge objecting nonmembers. In any event, nonmembers were informed in the notice that the presumption had been applied, and they also were provided with AEA's audited financial statements; thus the notice provided nonmembers with sufficient information to determine whether to object to the AEA portion of the agency fee. As for NEA-Alaska's expenditures, nonmembers were provided with NEA-Alaska's financial statements, as well as with a listing of its

The district court rejected respondents' contention that the court should determine issues of chargeability, holding that the arbitration process was "lawful, and must be utilized by employees who wish to challenge the Associations' calculation of chargeable and nonchargeable items for the purpose of establishing agency fees." App. 60a-61a. *See also* App. 26a, 38a-46a.

Respondents appealed to the Ninth Circuit on the arbitration issue and on certain other matters not at issue here. ASD cross-appealed on another matter not at issue.

The Ninth Circuit reversed the district court's ruling on "the issue whether nonmembers can be forced to arbitrate a union's chargeability determinations before seeking relief in federal court." App. 16a. Noting that "[o]ther courts are divided on this issue," *id.*, the court "agree[d] with the [decision of the] D.C. Circuit" in *Miller v. Air Line Pilots Association*, 108 F.3d 1415 (D.C. Cir. 1997), which is presently before this Court on certiorari, and held that "nonmembers are not required to exhaust union remedies to which they did not agree before challenging the chargeability determinations in federal court." App. 18a.

REASONS FOR GRANTING THE WRIT

This case presents in the public sector the question now pending before this Court under the Railway Labor Act in *Air Line Pilots Association v. Miller*, No. 97-428. For the following reasons, certiorari should be granted, and this case should either be remanded for reconsideration in light of *Miller*, or set for briefing and argument so as to decide whether the result reached in *Miller* under the Railway Labor Act is applicable to suits brought against public sector unions under the First Amendment and 42 U.S.C. § 1983.

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expenditures broken down into chargeable and nonchargeable categories. Although, as the district court found, the "chargeability" breakdown was not audited, the financial statements were.

1. As the court below recognized, "courts are divided on the issue" of "whether nonmembers can be forced to arbitrate a union's chargeability determinations before seeking relief in federal court." App. 16a. The Ninth Circuit stated that "[t]he Seventh and Tenth Circuits require 'exhaustion,' *see Lancaster v. Air Line Pilots Association Int'l*, 76 F.3d 1509, 1521, 1521-23 (10th Cir. 1996). . . .; *Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1314 (7th Cir. 1991), while the Third, Sixth, and D.C. Circuits do not, *see Miller v. Air Line Pilots Association*, 108 F.3d 1415, 1421 (D.C. Cir.). . . .; *Bromley v. Michigan Education Ass'n-NEA*, 82 F.3d 686, 694 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Hohe* [*v. Casey*], 956 F.2d [399, 409 (3d Cir. 1992)]." App. 16a-17a. The Ninth Circuit "agree[d] with the D.C. Circuit [in *Miller*]" and with the other courts that have held that "exhaustion" cannot be required. App. 18a.

Thus, the Ninth Circuit acknowledged that this case presents the same issue as is pending before this Court in *Miller*, and it decided that issue by following *Miller*.[5]

2. As is true of the D.C. Circuit's decision in *Miller*, the Ninth Circuit's decision in this case reaches an erroneous conclusion on an important issue of law.

a. In *Hudson*, this Court devised a balanced, integrated and carefully nuanced set of procedures tailored to "the objective . . . [of] devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302, quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977).

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[5] So, too, the brief for the respondents in *Miller* cites the Ninth Circuit's opinion here as having decided the issue presented in *Miller*; and that brief relies more heavily on the decision in this case than on any other appellate decision. *See* Brief for Respondents in *Air Line Pilots Association v. Miller*, No. 97-428, at 15 n.4, 18-19, 25.

Under the procedures set forth in *Hudson*, if a nonmember wishes to prevent the union from spending his money on matters that he believes are not germane to collective bargaining, he has "the burden of raising an objection." *Hudson*, 475 U.S. at 306. *See also Abood*, 431 U.S. at 238; *Machinists v. Street*, 367 U.S. 740, 774 (1961). However, "[t]he nonmember's 'burden' is simply the obligation to make his objection known," *Hudson*, 475 U.S. at 306 n.16; thus the nonmember need not identify the specific expenditures, or even the specific *categories* of expenditures, to which he objects. *Abood*, 431 U.S. at 241.

Upon receiving an objection, if there is a disagreement as to the amount of the agency fee that lawfully may be charged to objectors, the union must place in escrow "the amounts reasonably in dispute," *Hudson*, 475 U.S. at 310, so as to avoid using objectors' funds even "temporarily for an improper purpose." *Id.* at 305. Although *Hudson* held "that a 100% escrow is not constitutionally required," *id.* at 310, the Court expressly declined to decide how a union could determine "the size of any appropriate [lesser] escrow." *Id.* Given that uncertainty, and the difficulty of defining the amounts "reasonably in dispute" in circumstances where nonmembers have not been required to identify any specific grounds for objecting, AEA has chosen to escrow 100% of the agency fees of nonmembers who dispute the Union's chargeability determinations.

Having required unions to establish an escrow of disputed agency fees, *Hudson* also specified how and when the money is to be released from escrow: the Court held that a union must provide to objectors "a reasonably prompt opportunity to challenge the amount of the fee *before an impartial decisionmaker*, and an escrow for the amounts reasonably in dispute *while such challenges are pending*." *Id.* at 310 (emphasis added).

Although the *Hudson* Court did not expressly address the question presented here (with the exception of Justice

White, who stated in a concurring opinion, joined by Chief Justice Burger, that a union "should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts," *id.* at 311), the Court's statement that funds must be escrowed while challenges are pending *"before [the] impartial decisionmaker"* appears to contemplate that all objections will be presented to that decisionmaker; indeed, the Court did not describe any other mechanism for terminating the escrow of an objector's funds.

If *Hudson* were not understood as we suggest, the various components of the procedural system described by the Court would not fit together. *Hudson* surely does not imply that, if a nonmember prefers litigation to arbitration, the union must escrow the nonmember's funds until the litigation winds its way to conclusion.[6] Indeed, a nonmember who intends to bypass the arbitration process and to proceed solely through litigation should not be entitled to an automatic escrow in the first place. *Cf. Railway Clerks v. Allen,* 373 U.S. 113, 120 (1963) (holding that "dissenting employees . . . can be entitled to no relief until final judgment in their favor is entered;" until they win such a judgment, "they must pay to the bargaining representative . . . all sums required under the Agreement"). The requirement that a union, having received only a general objection from a nonmember, must establish an escrow to prevent expenditure of the nonmember's money on any activity as to which any nonmember could raise a "reasonable," even if nonmeritorious,

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[6] Such a suggestion would be untenable, both because litigation is inherently more protracted than arbitration, and because a nonmember pursuing a judicial challenge to an agency fee would have no legal obligation, and often no practical incentive, to proceed expeditiously, whereas a union has both the obligation under *Hudson,* and the practical incentive, to see to it that the arbitration process is "expeditious." *Id.* at 308 n.21.

objection, makes sense only if, as *Hudson* indicates, the escrow procedure is linked to an expeditious impartial decisionmaking process through which all objections will be considered.

b. That interpretation of *Hudson* also best comports with the "objective . . . [of] devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (internal quotation marks omitted).

To require resort to the arbitration process does not interfere with the objective of "preventing compulsory subsidization of ideological activity by employees who object thereto." All money reasonably in dispute is escrowed during the arbitration process; the process is impartial,[7] and, if an objector is dissatisfied with the arbitrator's decision, he then may pursue a "*subsequent* § 1983 action" in which "[t]he arbitrator's decision would not receive preclusive effect." *Id.* at 308 n.21 (emphasis added).[8]

On the other hand, the interest in not "restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities," *Hudson*, 475 U.S. at 302, which also must be taken into account and "protect[ed] . . . to the maximum extent possible without undue impingement . . . on the other [interest]," *Street*,

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[7] As noted *supra* at 4 and note 2, respondents conceded that AEA's agency fee arbitration procedure is impartial.

[8] The Ninth Circuit declared that "[t]o require nonmembers to exhaust arbitration before being entitled to file a federal court action would frustrate the intent of expediting the chargeability calculation and refund process." App. 18a. That statement assumes that the arbitration process, which certainly is more "expedi[tious]" than a judicial process, cannot result in a proper "calculation and refund." There is no basis for that assumption.

367 U.S. at 773, is promoted by requiring objectors to avail themselves of the arbitration process.

If "exhaustion" were not required, a union could be required to proceed to arbitration with respect to those objectors who choose arbitration (because *Hudson requires* unions to provide an expeditious nonjudicial procedure, *id.* at 307-308 & n.20), while proceeding at the same time to litigation at the demand of those objectors who wish to bypass the arbitration. This would be the most expensive and burdensome system imaginable, and it would deprive a union of the "time and money" it needs to carry out its "great responsibilities" as exclusive bargaining agent. *Abood*, 431 U.S. at 221.

In contrast, if objectors are required to resort to the union's impartial decisionmaking process, there will be a single impartial forum in which all objections are considered expeditiously and without undue expense. It is to be expected—and the experience of AEA's parent organizations confirms—that objectors often will find that the arbitrator's decision satisfactorily resolves their objections. *Cf. Clayton v. Automobile Workers*, 451 U.S. 679, 689 (1981). After all, at the time a nonmember notes an objection, he may not have any clear understanding of the law; and, because of the unavoidable limitations on the extent of the information that can practicably be conveyed in a notice, the objector also may be under a misconception as to the nature of the union's actual expenditures and practices. So too, a nonmember may simply distrust the union's calculation of the fee, without having any specific ground for disputing the calculation, and such a nonmember may well drop his objection once an impartial decisionmaker has reviewed the union's calculation.

Thus, objections that are asserted upon receipt of a "*Hudson* notice" are, as a class, particularly amenable to resolution through procedures short of formal litigation.

To be sure, in some cases an objector who has submitted his objection to the arbitrator for resolution will be dissatisfied with the arbitrator's decision and will choose, as *Hudson* allows, to pursue a "subsequent § 1983 action." But in most cases, arbitration will prove to be a "more practical alternative[ ] to litigation for the vindication of the rights and accommodation of interests here involved." *Allen*, 373 U.S. at 124. And what this Court has stated with respect to administrative procedures applies here to the arbitration process as well: "[E]ven where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

In sum, the decision of the court below, allowing nonmembers to challenge a union's chargeability determinations in federal court despite having bypassed the impartial decisionmaking process provided by the union, is erroneous for the same reasons as the D.C. Circuit's decision in *Miller* is erroneous.[9]

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[9] Although there is language in the Ninth Circuit's opinion suggesting that what the district court required here was arbitration of respondents' "damages," *see* App. 15a, 16a, such a characterization is inapt. As noted above, the only violation found by the district court was that certain information was not included in AEA's notice. To arbitrate objections to the Union's *chargeability determinations*—which, as the Ninth Circuit recognized, is all that AEA contended respondents should be required to arbitrate, *see* App. 18a—has nothing to do with determining "damages" for the notice deficiencies found by the district court; the right of a nonmember to receive a refund if AEA's chargeability determinations were incorrect is independent of, and unaffected by, the question whether AEA's notice contained all of the requisite information.

The court below did not suggest that its characterization of this case as involving arbitration of "damages" made the issue presented here different in any respect from the issue presented in *Miller*. To the contrary, the Ninth Circuit expressly stated that the issue presented here is the same as in *Miller*—"whether nonmembers can be forced to arbitrate a union's chargeability

3. While *Miller* arises under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), this case arises under the First Amendment and 42 U.S.C. § 1983. The respondents in *Miller* have argued that this is a distinction without a difference. *See* Brief for Respondents in *Miller*, *supra*, at 15 n.4 (citing RLA cases and § 1983 cases interchangeably as having "considered th[e] issue" presented in *Miller*); *id.* at 25 (arguing that the RLA and § 1983 embody the same policy with respect to "exhaustion"). It is possible, however, that *Miller* may not completely resolve the issue presented in this case, because this Court's decision in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), which addresses "exhaustion of remedies" in the context of § 1983, does not apply in terms to the RLA.

As we next explain, if resort to agency fee arbitration may be required under the RLA, it may be required under § 1983 as well, and to whatever extent there may be room to question that proposition, this does not provide any reason to deny certiorari. Rather, it simply means that, depending on the basis on which *Miller* is decided, this Court might find it appropriate to set this case for briefing and argument to decide the § 1983 ques-

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determinations before seeking relief in federal court." App. 16a-17a.

There is one factual distinction between this case and *Miller* that should be noted. Although the union in *Miller* did not escrow the *entire* amount of an objector's agency fee, AEA *does* escrow the entire amount of the fees of all nonmembers who dispute the Union's chargeability determinations. The respondents in *Miller* have emphasized the fact that there was not a 100% escrow in that case. *See* Brief for Respondents in *Miller*, *supra*, at 40. It is clear that *Hudson* does not require a 100% escrow, *see supra* at 7, and we do not believe that the question whether a nonmember must present his fee objections to arbitration turns on whether *all* of the fee, or only some portion "reasonably in dispute," is escrowed in the meantime. However, if that factor were deemed relevant, it would mean that this is an even stronger case for "exhaustion" than *Miller*.

tion, rather than simply remanding the matter to the court of appeals for reconsideration.

a. *Patsy* holds only that a § 1983 plaintiff need not exhaust "state administrative remedies." *Id.* at 498. *See also id.* at 505 (noting "the belief of the 1871 Congress that the *state authorities* had been unable or unwilling to protect . . . constitutional rights") (emphasis added). The *Hudson* impartial decisionmaking process is not a state administrative remedy; it is a procedure created and governed by federal law, and it is administered by a union, not by state authorities.

Because Congress has not clearly spoken on the matter, the question whether "exhaustion of remedies" should be required in this context must be determined by this Court in accordance with "sound judicial discretion." *McCarthy v. Madigan*, 503 U.S. at 144. At least one of the grounds on which courts traditionally have required exhaustion—to "promote[ ] judicial efficiency," *id.* at 145—plainly is applicable here. If objections must be taken to arbitration, "a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." *Id.* "And even where a controversy survives . . . review, exhaustion of the . . . procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.* On the other hand, the kinds of circumstances that have been held to weigh against exhaustion—"an unreasonable or indefinite timeframe for . . . action," *id.* at 147, a lack of power to grant effective relief, *id.* at 147-148, or the presence of bias, *id.* at 148—are not presented here. An exhaustion-of-remedies requirement therefore would be consistent with this Court's exhaustion jurisprudence.

b. There is a more fundamental reason why the position adopted by the court below is not required by *Patsy's* "no exhaustion" rule: to hold that a nonmember may not bypass a union's agency fee arbitration process and then mount a First Amendment challenge to the fee is not to

require exhaustion of a remedy for any constitutional violation. Rather, the *Hudson* procedures exist to "avoid the risk" of a constitutional violation in the first place. *Hudson*, 475 U.S. at 305.

The *Hudson* impartial decisionmaking process thus serves a function that is closely analogous to procedures the government may require in other First Amendment contexts. For example, this Court has allowed the government to require would-be speakers to follow reasonable procedures to obtain a license or a permit for certain forms of expression, such as public parades or the exhibition of motion pictures, despite the fact—absent here—that such speech is *suppressed by the government* while such proceedings are conducted. *See, e.g. Cox v. New Hampshire*, 312 U.S. 563 (1941); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961). In holding that the government may punish individuals who engage in speech without having availed themselves of the procedure established by the government to determine whether such speech should be permitted, this Court has not reasoned that the speakers failed to exhaust an administrative remedy for a constitutional violation. Rather, the point of the cases is that, where a speaker has declined to participate in a reasonable procedure established by the government to determine whether the speech in question should be permitted or whether legitimate government interests would be best served by denying such permission, the government's refusal to permit the speech *does not violate the First Amendment.*[10]

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[10] *Cf. also Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (rejecting claim under Takings and Due Process Clauses on ground that petitioner had not first followed state administrative procedures for reaching final decision on the taking, because "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue").

Such principles are fully applicable here. The essence of a cognizable First Amendment claim in the agency fee context is "that a union has utilized an individual agency-shop agreement to force dissenting employees to subsidize ideological activities." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991). When a union has sent a notice informing a nonmember that it will not spend his funds for any activity the nonmember regards as not germane to collective bargaining unless and until an impartial arbitrator has sustained the union's right to do so, and the nonmember fails to participate in the arbitration simply because he would rather proceed directly to court, the union's action in spending the objector's funds cannot fairly be characterized as "forc[ing] [the] dissenting employee[ ] to subsidize ideological activities."

c. Whatever may be the ultimate merits of the *Patsy* issue in this context, it is clear that the decision below was based on the Ninth Circuit's agreement with the D.C. Circuit's decision in *Miller*. *See supra* at 5-6. Indeed, in discussing the views of other circuits on "the issue" before it for decision, App. 16-17a, the court below cited interchangeably to decisions under the RLA and under § 1983. *Id.* Hence, certiorari should be granted in this case, and, at the least, the matter should be remanded for reconsideration in light of *Miller*. Alternatively, if this Court decides *Miller* on a basis that leaves open the question presented here under § 1983, this case would provide an appropriate vehicle for this Court to resolve that important question, which has been the subject of much more extensive litigation than the RLA issue presented in *Miller*.[11]

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[11] Of the six appellate decisions cited by the court below as having resolved the "exhaustion" issue (including the instant case), four arose under § 1983 and only two arose under the RLA. *See cases* cited at App. 16a-17a. Of the nine decisions of the Courts of Appeals and state supreme courts that are cited by the *Miller* respondents as having considered this issue, all but three arose under § 1983. *See* cases cited in Brief for Respondents in *Miller*, *supra*, at 15 n.4.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for certiorari and should either remand this case for reconsideration in light of *Miller* or set the case for briefing and argument.

Respectfully submitted,

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March 1998

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 95-35848, 95-36283, 96-35166 and 96-35174

CAROL J. KNIGHT; LEONARD F. BALL; ROBERT M. BIRD; ROSEMARY K. BIRD; ANN MARIE DAHL; JOSEPH DILLEY; BEVERLY L. EDWARDS; MICHAEL P. HEAPHY; GARY JOHN HORWATH; JAMES K. HUNTER; MICHAEL E. JOHNSON; DAVID MCCORD; SALLY L. OELRICH; DEANNE P. POKRYFKI; DONNA L. REHBERG,
Plaintiffs-Appellants,

v.

KENAI PENINSULA BOROUGH SCHOOL DISTRICT; WALTER BROMENSCHENKEL, Superintendent; HELEN SIBSON; KENAI PENINSULA EDUCATION ASSOCIATION,
Defendants-Appellees.

GARY JEFFERSON; EUGENE L. DYSON; DAVID JOHNSON; DANIEL L. HASTINGS; STEPHEN A. MCFERRON,
Plaintiffs-Appellants,

v.

KENAI PENINSULA BOROUGH SCHOOL DISTRICT; WALTER BROMENSCHENKEL, Superintendent; HELEN SIBSON, Director; KENAI PENINSULA EDUCATION ASSOCIATION,
Defendants-Appellees.

REBECCA L. PATTERSON; JUDY O. WEIMER; ANDREW J. RABUNG; ADOLPH HINSON; EMMA L. SMITH; CAROLE GENE MURRAY; MARJORIE KYLE,
Plaintiffs-Appellants,

v.

ANCHORAGE SCHOOL DISTRICT; ROBERT CHRISTAL, Acting Superintendent Anchorage School District; LELAND C. WILSON, Executive Director/Instructional Support Programs and Certified Labor Relations; ANCHORAGE EDUCATION ASSOCIATION; NEA-ALASKA,
Defendant-Appellees.

REBECCA L. PATTERSON; JUDY O. WEIMER; ANDREW J. RABUNG; ADOLPH HINSON; EMMA L. SMITH; CAROLE GENE MURRAY; MARJORIE KYLE,
Plaintiffs-Appellees,

v.

ANCHORAGE SCHOOL DISTRICT; ROBERT CHRISTAL, Acting Superintendent Anchorage School District; LELAND C. WILSON, Executive Director/Instructional Support Programs and Certified Labor Relations,
Defendants-Appellants,

and

ANCHORAGE EDUCATION ASSOCIATION; NEA-ALASKA,
Defendants.

Argued and Submitted July 14, 1997
Decided Dec. 8, 1997

Appeals from the United States District Court for the District of Alaska; John W. Sedwick, District Judge, Presiding (Nos. 95-35848 and 95-36283), H. Russel Holland, District Judge, Presiding (Nos. 96-35166 and 96-35174). D.C. Nos. CV-94-00438-JWS, CV-94-00437-JWS, CV-93-00189-HRH.

Before: WALLACE, JOHN T. NOONAN, JR., and THOMPSON, Circuit Judges.

WALLACE, Circuit Judge.

In these three cases consolidated for appeal, we consider the often murky area of the rights and responsibilities of nonunion employees in the union shop context. Responding to issues decided by the district court, the nonunion employees and one of the public employers appeal from parts of the various judgments. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983, and we have jurisdiction over these timely appeals pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand all three cases.

I

Nonunion employees may be required to pay unions for benefits they receive from union collective bargaining efforts. These three appeals involve this issue in the settling of school employees.

A.

Knight (No. 95-35848) involves the Kenai Peninsula Education Association (KPEA), a collective bargaining unit for teachers in the Kenai Peninsula Borough School District. *Jefferson* (No. 95-36283) involves the Kenai Peninsula Educational Support Association (KPESA), which is the collective bargaining unit for school support staff in the Kenai Peninsula district. *Patterson* (Nos. 96-35166 and 96-35174) involves the Anchorage Education Association (AEA), the collective bargaining unit for

teachers in the Anchorage School District. In all three cases, plaintiffs are nonunion members who, though not required to join the respective associations, must nevertheless pay a representation or agency fee because they benefit from the collective bargaining efforts of the associations. Alaska Stat. § 23.40.110.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-36, 97 S.Ct. 1782, 1799-1800, 52 L.Ed.2d 261 (1977), the Court held that, while nonunion members could be compelled to contribute to their share of costs of collective bargaining, they could not be compelled to contribute funds used to finance ideological causes not germane to collective bargaining. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) (*Hudson*), the Court set forth the minimum procedural protections for collection of agency fees: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. at 1078.

The unions and school districts in these case have adopted similar procedures. At the beginning of the school year, the unions send a so-called "*Hudson* notice" that explains the breakdown between chargeable and nonchargeable expenses so that nonmembers can decide whether to object to paying for union activities that are not related to collective bargaining. Nonmembers who object have two options. They can accept the union's calculation of their share of chargeable expenses and receive a rebate equal to the percentage of full dues attributable to nonchargeable expenses. Alternatively, they can reject the union's determination, and submit to an arbitrator's calculation of the chargeable/nonchargeable expense breakdown. In that event, the nonmembers' payments are placed into an escrow account until the arbitration is completed.

B.

On August 20, 1994, KPESA sent a letter to its nonmembers, asking them to fill out and return an attached form by September 15. The form sought, among other things, the desired method of payment for dues. KPESA provided no breakdown of chargeable and nonchargeable expenses and did not indicate that one would be forthcoming.

A day later, KPEA sent a letter to its nonmember teachers detailing the payment options for union dues or representation fees. This letter did not provide a breakdown of chargeable and nonchargeable expenses, but instead stated that one would be provided in October.

Knight and fourteen other teachers (Knight) and Jefferson and four other support staff members (Jefferson) filed their actions in district court on September 21, 1994. A month later, the school district refunded any money that nonmember teachers and support staff had paid as a result of the August 21 letter and stated that no deductions would begin until KPEA and KPESA had distributed the *Hudson* notice.

On November 10, 1994, KPEA sent a 116-page *Hudson* notice to all nonmember teachers. This notice consisted of an audited breakdown of 1992-93 expenses for the National Education Association (NEA) and NEA-Alaska, the parent units of KPEA, from which KPEA calculated the all-important ratio between chargeable and nonchargeable expenses which would then be applied toward the local KPEA dues to determine the appropriate local breakdown. KPESA sent the same notice to nonmember support staff.

Knight and Jefferson amended their respective complaints to include this subsequent mailing as an additional basis for liability. Both also sought certification of class actions. As of the date of the district court's decision, none of the Knight plaintiffs had paid any fee for the

1992-93 school year. Among the Jefferson plaintiffs, only Daniel Hastings had, and he is not before us.

In *Knight*, the district court entered summary judgment in favor of KPEA and the school district, holding that the KPEA's refund of monies received in response to the August letter mooted that issue, and that the November letter satisfied *Hudson*. The district court also held that KPEA's categorization of litigation expenses was not flawed, that the challenge to the use of an escrow fund to hold monies paid by challengers was moot, and that KPEA's indemnification of the school district for any legal liability incurred as a result of enforcing the collective bargaining agreement was not void as against public policy. In *Jefferson*, the district court relied upon the same analysis to reach the same results, except that the mootness ruling on the escrow issue did not apply to Hastings.

C.

On September 11, 1992, AEA (through NEA-Alaska) sent a 230-page *Hudson* notice to teachers in the Anchorage School District. The notice did not include an audited AEA financial report, a breakdown of chargeable and nonchargeable expenses, or an audited breakdown of NEA-Alaska's chargeable and nonchargeable expenses. AEA later sent a supplemental notice that contained its audited financial statement.

Patterson and seven other teachers (Patterson) refused to pay the representation fee and sought to have the chargeability determination adjudicated in court. One of the teachers, Andrew Rabung, subsequently agreed to pay the full union membership fee when he was threatened with discharge. His subsequent efforts to withdraw that agreement were unavailing.

A different district judge of the District of Alaska held that the two mailings to the nonmembers failed to satisfy *Hudson* because the AEA used a "local unit presumption"

(that is, a presumption that the local union will spend a larger percentage of dues on chargeable events than national organizations do, and hence use of the national chargeability breakdown is acceptable) instead of providing an audited breakdown. The court held that AEA's deduction-escrow-refund procedure complied with our precedents, and that the clause by which AEA indemnifies the school district for any liability incurred as a result of carrying out the collective bargaining agreement was not void as against public policy. The court denied Patterson's motion for class certification with leave to renew if the court's assessment that the motion was moot was erroneous. In a subsequent order, the court held that the appropriate remedy for the *Hudson* violation was to order arbitration. The court also held that the Anchorage School District owed Patterson a duty to review AEA's *Hudson* notice to ensure that the notice was satisfactory.

II

Knight (No. 95-35848)

Knight raises the following issues on appeal: (1) whether the August 21 letter complied with the requirements of *Hudson;* (2) whether the November 10 notice complied with *Hudson;* (3) whether KPEA discriminated against fee payers who challenged the chargeability determination compared to those who merely objected; and (4) whether the indemnification clause is void as against public policy.

A.

The district court held that KPEA's prompt refund of monies paid in response to the August 21 letter "cured" all deficiencies in the letter. Therefore, the court deemed the entire matter of the August 21 letter to be moot.

We review a district court's determination of mootness de novo. *Native Village of Noatak v. Blatchford,* 38 F.3d 1505, 1509 (9th Cir.1994). An issue will be deemed

moot if the court is unable to fashion any effective relief under the circumstances. *American Casualty Co. v. Baker,* 22 F.3d 880, 895-96 (9th Cir.1994).

The August 21 letter was not a *Hudson* notice, as it failed to provide any breakdown between chargeable and nonchargeable expenses. It was, however, a clear demand for representation fees. The end of the letter read, "[i]t is imperative that you get the KPEA MEMBERSHIP/FEE AND AUTHORIZATION FORM *completed, signed, and returned to Payroll at Central Office by September 15 so that payroll deductions can begin in a timely manner.*" (Emphasis added.)

The constitutional defect in this letter was not that it was an inadequate *Hudson* notice (it did not even purport to be such), but rather that it sought to collect representation fees without providing a reasonable explanation of the basis for the fee. The letter's statement that a *Hudson* notice would be forthcoming does not remedy the defect, because the letter required a response by mid-September, weeks before the *Hudson* notice was due to be distributed.

KPEA argues that its collection procedure complied with *Grunwald v. San Bernardino City Unified School District,* 994 F.2d 1370 (9th Cir.1993). In *Grunwald,* we upheld a school district's procedure of beginning payroll deductions for nonmember representation fees in September, even though the *Hudson* notices were not sent out until mid-October. We did so because, as a practical matter, the union could not reasonably identify teachers until after they had begun work for the academic year. *Id.* at 1376. But as soon as is practicable, the union must send out proper notices. *See id.* at 1375-76. That was not done here; therefore, *Grunwald* is inapplicable.

That none of the Knight plaintiffs paid the fee, or that KPEA refunded the monies received in response to the August letter is relevant to the amount of damages; however, it does not foreclose nominal damages, *see Hohe*

v. Casey, 956 F.2d 399, 416 (3d Cir.1992) (*Hohe*), and attorneys' fees pursuant to 42 U.S.C. § 1988 "unless there is some special circumstance which would justify the court's refusal." *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1534 (9th Cir.1993).

We reverse the district court's order holding that the challenge to the adequacy of the August 21 letter was moot. On remand, the district court is to enter judgment in favor of Knight and to determine whether nominal damages, declaratory relief, and an award of attorneys' fees are appropriate.

B.

The district court entered summary judgment in favor of KPEA regarding the November 10 notice as well, holding that it satisfied *Hudson* because it provided sufficient information from which a nonmember could decide whether to object. We review a summary judgment de novo. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

Knight argues that the November 10 notice was constitutionally defective for two reasons. First, KPEA provided two breakdowns of chargeable and unchargeable expenses, only one of which was audited. Second, KPEA's procedure for determining which expenses are chargeable and which are unchargeable is allegedly so vague that it virtually assures that nonmembers will be overcharged.

In *Hudson*, the Court required "that the potential objectors be given sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306, 106 S.Ct. at 1076. Although "absolute precision" of the calculation is not necessary, "adequate disclosure [ ] include[s] the major categories of expenses, as well as vertification by an independent auditor." *Id.* at 307 n. 18, 106 S.Ct. at 1076 n. 18.

The parties' dispute on appeal has focused on the chargeability breakdown for three categories of expenses

for the 1992-93 school year: Legal Services, Membership and Affiliates, and Support and Overhead. For these categories, the figures in the audited NEA breakdown do not match those in the unaudited NEA-Alaska breakdown. For example, the NEA's audited budget for legal services was $20,543,978, of which $13,385,102 was deemed chargeable and $7,158,876 unchargeable. The unaudited NEA-Alaska breakdown listed the same overall figure of $20,543,978, but deemed $11,683,468 to be chargeable and $8,860,510 to be unchargeable.

KPEA contends that the disparity results from adjustments to the figures to take into account the local breakdown for NEA-Alaska. For example, the NEA legal services budget included $14,180,286 for a "Unified Legal Services Program," which was deemed 50 percent chargeable. However, NEA-Alaska determined that its reimbursement for this program was actually only 38 percent chargeable. Thus, KPEA adjusted the legal services breakdown.

The purpose of an audit is to have an independent accountant determine whether the union has actually spent the amounts of money it claimed to have spent on the chargeable activities. *See, e.g., Dashiell v. Montgomery County, Maryland*, 925 F.2d 750, 756 (4th Cir.1991) (*Dashiell*); *Gwirtz v. Ohio Education Association*, 887 F.2d 678, 682 (6th Cir.1989) (*Gwirtz*); *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir.1987). In this case, the problem with the disparity in the figures between the audited and unaudited 1992-93 reports is that no independent accountant has determined whether KPEA actually spent the amounts it claimed to have spent on chargeable expenses in the unaudited report. KPEA contends that the unaudited report was generated through the use of two audited reports (the national NEA breakdown and a separate audited breakdown of local chargeable and nonchargeable expenses for the local portion of the national programs),

and that there was no need for an auditor to confirm that KPEA had performed the mathematical adjustment correctly.

With the benefit of KPEA's appellate brief, we are able to confirm that the unaudited figure does result from the adjustment based on local figures. However, the purpose of a *Hudson* notice is not so that the federal courts can review the union's accounting after the fact; it is to provide the employee with "sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1076. Thus, we must look at the form and content of the notice from the perspective of the employee at the time the employee receives it.

Having reviewed the November 10 notice carefully, we conclude that a teacher receiving KPEA's notice could not have determined that the unaudited figures were based on two sets of audited figures. Although the unaudited report contains three footnotes explaining the adjustments, there is no cross-reference to the audited local breakdown. For example, footnote 1 to the unaudited report explains that the chargeable portion of the Unified Legal Services Program was reduced from 50 percent to 38 percent. However, it is only with the aid of KPEA's appellate brief that we are able to determine that the 38 percent figure appears in the audited local breakdown. Even then, the subcategory is listed as "Employee Rights," not Legal Services. Without the brief, an employee would not have been able to connect the two audited reports.

Other courts have concluded that *Hudson* merely requires that the union provide sufficient information so that employees can decide whether to object, and that it does not require absolute precision. *See, e.g., Dashiell*, 925 F.2d at 756; *Gwirtz*, 887 F.2d at 682. However, KPEA's notice fails to meet even this standard, because nonmembers were not provided with sufficient direction to be able to determine that KPEA's expenditures were

audited. Therefore, we hold that the November 10 notice did not satisfy *Hudson*.

Knight's second contention is that KPEA's standard for determining whether expenses were chargeable, as stated in the November 10 notice, was vague and overbroad. She challenges, for example, whether litigation KPEA has categorized as chargeable is germane to collective bargaining.

This argument demonstrates a fundamental misunderstanding of *Hudson*. There is a "clear distinction between the adequacy of a union's notice, addressed by the Supreme Court in *Hudson*, and the propriety of a union's chargeability determinations, considered separately by the Supreme Court in *Lehnert* [*v. Ferris Faculty Association*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991)]." *Jibson v. Michigan Education Association-NEA*, 30 F.3d 723, 730 (6th Cir. 1994); *see also Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1314 (7th Cir.1991) (holding that the plaintiffs "mistakenly equate[ ] the adequacy of the notice with the accuracy of the fee assessment"). Knight's contention that she is not challenging factual determinations is unpersuasive and not supported by the cases on which she relies. In *Abrams v. Communications Workers of America*, 59 F.3d 1373, 1380 (D.C.Cir.1995), the notice was defective because it failed to inform employees that they could object, a factor not present in this case. In *Hohe*, 956 F.2d at 414, the court upheld the union's standard for chargeable costs by treating the challenge as one "to the propriety of the fair share fee," and not as the adequacy of notice. In *Tierney v. City of Toledo*, 824 F.2d 1497, 1505-06 (6th Cir.1987) (*Tierney*), the court did not hold that the union's formulation of chargeable costs was "substantively erroneous"; the court held that the difference in formulation plans was "substantial."

We agree with the Sixth and Seventh Circuits that at the notice stage, we do to decide whether expenses are prop-

erly chargeable. Therefore, we vacate the portion of the district court's order in which it held that the contested litigation expenses were properly chargeable.

C.

Next, Knight challenges KPEA's distinction between objectors, who receive an immediate refund of that portion of fees attributable to nonchargeable expenses, and challengers who must pay the full fee and wait for a refund. Knight also argues that the indemnification clause is void as against public policy.

We do not reach these issues. Knight's challenge to the distinction between objectors and challengers is moot, because an arbitrator has already affirmed KPEA's chargeability determinations for the academic year in question. Thus, Knight will be treated no differently whether she chooses to accept KPEA's chargeability determination or the arbitrator's.

Knight's argument that the indemnification clause should be voided as against public policy is not yet ripe. Whether an issue is ripe for determination is based on whether it is "fit for judicial decision" and "whether the parties will suffer hardship if we decline to consider the issues." *San Diego County Gun Rights v. Reno*, 98 F.3d 1121, 1132 (9th Cir.1996). Both considerations dictate that we deem this issue not ripe. Knight's argument is that the school district will feel freer to violate the constitutional rights of nonmember teachers due to the indemnification clause. This argument contains factual assertions that cannot be assessed on the current record. *Cf. id.* ("[P]ure legal questions that require little factual development are more likely to be ripe."). Moreover, the school district has not yet taken any action against Knight that would subject the teachers to any liability. Hence, Knight will not suffer any hardship if we do not reach this issue.

III

Jefferson (No. 95-36283)

Jefferson raises three issues similar to those of Knight: (1) whether the August 20 letter from KPESA complied with the requirements of *Hudson*; (2) whether the November 10 notice complied with *Hudson*; and (3) whether KPESA discriminated against fee payers who challenged the chargeability determination compared to those who merely objected.

We have set forth the applicable law in our analysis in *Knight*. We now apply those legal principles to the facts in *Jefferson*.

A.

The August 20 letter from KPESA stated in part that "*all* employees, as a condition of employment, are required to *either join KPESA* as a full member or to *pay a representation fee*" (emphasis in original). The letter further asked nonmembers "to fill out the attached form and return it to Helen Sibson in payroll *no later than September 15, 1994*" (emphasis in original). The attached form requested basic information in addition to a method of payment for membership dues or representation fees.

This letter is deficient for the same reason that KPEA's letter is deficient: it seeks payment of agency fees from nonmembers without providing any information regarding the chargeability breakdowns. Similarly, for the same reason that Knight's claim on this issue is not moot, this issue is not moot for Jefferson either.

We therefore hold that the district court erred in concluding that KPESA had cured all harm by refunding monies paid in response to the August 20 letter. On remand, the district court is to enter judgment in favor of Jefferson on this issue and to determine whether nominal

damages, declaratory relief, and an award of attorneys' fees are appropriate.

B.

The November 10 notice that KPESA mailed to its nonmembers suffers from the same infirmity that the KPEA notice does, because it uses the same NEA and NEA-Alaska breakdowns. Thus, the notice is deficient for the same reason that the KPEA notice is deficient.

Jefferson also challenges KPESA's standards for chargeability, contending that they are so vague that nonmembers are certain to be overcharged. We have already addressed this argument in *Knight*, and our analysis is equally pertinent here. We deal here only with notices, not with the issues of proper chargeability.

C.

Finally, Jefferson challenges the deduction-escrow-refund procedure, contending that it unconstitutionally discriminates against nonmembers who challenge the chargeability determination by forcing them to wait longer than objectors to receive refunds. We have analyzed this issue in *Knight*, and for the same reasons, we dismiss this claim as moot.

IV

Patterson (Nos. 96-35166 and 96-35174)

This issues in this appeal are whether the district court erred in holding that (1) AEA's deduction-escrow-refund procedure complied with *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370 (9th Cir. 1993); (2) Patterson was not entitled to a full refund of all collected fees as a remedy for the defective *Hudson* notice; (3) Patterson had to arbitrate her damages; and (4) the class certification motion was moot. The issues on cross-appeal are whether (1) the school district had a

duty to review the *Hudson* notice; and (2) the indemnification clause is void as against public policy.

A.

As stated earlier, *Hudson* set forth three requirements that unions must satisfy before they can collect agency fees: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310, 106 S.Ct. at 1078.

In this case, the district court held that the explanation provided to the nonmembers, along with the supplemental mailing, was deficient, a ruling that AEA has not appealed. Because it provided inadequate notice, AEA failed to satisfy *Hudson*'s requirements and was not entitled to the fees that it collected. Patterson is therefore entitled to relief.

AEA's argument that *Grunwald* applies here is unpersuasive for the reasons discussed earlier. Hence, we need not reach Patterson's argument that *Grunwald* conflicts with *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805 (9th Cir.1991).

We leave the measure of damages and the suitability of other relief for the district court to determine in the first instance. *See Hudson*, 475 U.S. at 310, 106 S.Ct. at 1077-78. The district court held, however, that the only relief available was a declaration of rights, and that other relief had to be arbitrated. We have not previously reached the issue of whether nonmembers can be forced to arbitrate a union's chargeability determinations before seeking relief in federal court. Other courts are divided on this issue. The Seventh and Tenth Circuits require "exhaustion." *see Lancaster v. Air Line Pilots Association Int'l*, 76 F.3d 1509, 1521-23 (10th Cir.1996) (*Lan-*

caster); *Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1314 (7th Cir.1991), while the Third, Sixth, and D.C. Circuits do not. *See Miller v. Air Line Pilots Association*, 108 F.3d 1415, 1421 (D.C.Cir.) (*Miller*), *petition for cert. granted in part by*, —— U.S. ——, 118 S.Ct. 554, —— L.Ed.2d —— (1997); *Bromley v. Michigan Education Ass'n-NEA*, 82 F.3d 686, 694 (6th Cir. 1996), *cert. denied*, —— U.S. ——, 117 S.Ct. 682, 136 L.Ed.2d 607 (1997); *Hohe*, 956 F.2d at 409.

Those courts that have imposed an exhaustion requirement have done so for three reasons. First, Justice White's concurrence in *Hudson* suggested that "if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." 475 U.S. at 311, 106 S.Ct. at 1078 (White, J., concurring). Second, in the absence of an exhaustion requirement, "the procedure spawned by the Supreme Court [in *Hudson* would be] largely a waste of time and money." *Lancaster*, 76 F.3d at 1522 (alteration in original), *quoting Bromley v. Michigan Education Association*, 843 F.Supp. 1147, 1153 (E.D.Mich.1994), *op. vacated*, 82 F.3d 686 (6th Cir.1996), *cert. denied*, —— U.S. ——, 117 S.Ct. 682, 136 L.Ed.2d 607 (1997). Finally, not requiring exhaustion would lead to federal courts being "forced to micromanage the fee calculation in every case challenging a union assessment." *Id.*

These concerns are practical, but "policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent." *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 513, 102 S.Ct. 2557, 2566, 73 L.Ed.2d 172 (1982). Congress imposed only a limited exhaustion requirement on actions brought under 42 U.S.C. § 1983, as this case was. The statute requires exhaustion only when brought by prisoners. Thus, mandating exhaustion in this case would not

be consistent with congressional intent. *See id.* at 515-16, 102 S.Ct. at 2567-68.

We also agree with the D.C. Circuit, which found "no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process." *Miller,* 108 F.3d at 1421. Aside from Justice White's concurrence, *Hudson* made no mention of mandatory exhaustion. Indeed, in our view, such a requirement is inconsistent with *Hudson.*

Hudson imposed an obligation on unions and employers to provide for "a reasonably prompt decision by an impartial decisionmaker" so that nonmembers would have an alternative forum for redress than courts. 475 U.S. at 307, 106 S.Ct. at 1076. The Court seemed most concerned with ensuring that nonmembers be able to obtain a speedy resolution without having to endure lengthy and protracted litigation in court. To require nonmembers to exhaust arbitration before being entitled to file a federal court action would frustrate the intent of expediting the chargeability calculation and refund process.

We therefore hold that nonmembers are not required to exhaust union remedies to which they did not agree before challenging the chargeability determinations in federal court. The district court's order requiring arbitration of this issue is reversed.

B.

Finally, Patterson argues that the district court erred in denying the motion to certify the class. We review a district court's denial of class certification for abuse of discretion. *Valentino v. Carter-Wallace, Inc.,* 97 F.3d 1227, 1233-34 (9th Cir.1996).

The court's order stated that "[t]he court is of the view that class certification in this case may very well have become a moot issue." Our holding with respect to the deficient notice and arbitration requires further proceed-

ings in this case and necessarily implies that the case is not moot. Because a district court abuses its discretion when it makes an error of law, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2460-61, 110 L.Ed.2d 359 (1990), we reverse the district court's denial of the motion for class certification and remand so that the court can rule on the merits of the certification motion.

C.

The Anchorage School District cross-appeals from the district court's ruling that it had "a duty to take reasonable precautions to make certain notice is sufficient and procedures are in place that protect the First Amendment rights of non-union members." We review the district court's summary judgment de novo.

The district court's holding regarding the scope of the duty owed by the school district was derived from four cases: *Tierney*, 824 F.2d at 1505; *Jordan v. City of Bucyrus, Ohio*, 739 F.Supp. 1124, 1126-27 (N.D.Ohio 1990); *Mitchell v. Los Angeles Unified School District*, 739 F.Supp. 511, 516 (C.D.Cal.1990); *Dixon v. City of Chicago*, 669 F.Supp. 851, 852-53 (N.D.Ill.1987). These cases, in turn, synthesized the scope of duty owed by school districts from *Hudson*, in which the Court held that the public employer "and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." 475 U.S. at 307 n. 20, 106 S.Ct. at 1076 n. 20. This holding, however, arose specifically in connection with the requirement of a reasonably prompt decision by an impartial decisionmaker. It does not deal with the notice issue. Indeed, nowhere in the section where the Court discussed the requirement of adequate information is there any indication that the employers owe any duty. *See id.* at 307 n. 18, 106 S.Ct. at 1076 n. 18 (requiring the union to provide *Hudson* notice to nonmembers, but not mentioning employers).

We are not persuaded that the school district owes a duty of reasonable review of AEA's *Hudson* notice before the notice is mailed. The notice is mailed directly from AEA to the nonmembers, and the school district does not get involved until AEA seeks to force a nonmember to pay a representation fee. This necessarily occurs at a substantially later time. At that later stage, the school district cannot take adverse action against the nonmember employee without first ensuring that the nonmember's constitutional rights were not violated by AEA. *See, e.g., Tierney,* 824 F.2d at 1504.

Therefore, we hold that the school district's duty to nonmembers is to evaluate the sufficiency of the union's notice at the time the union seeks to take action against a nonmember for failure to pay the agency fee, and not at the time of the initial mailing of the *Hudson* notice. This part of the district court's determination is reversed.

D.

Finally, in opposition to the cross-appeal, Patterson argues for the first time that the school district's indemnification clause is void as against public policy. "[W]e will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief." *International Union of Bricklayers & Allied Craftsman v. Martin Jaska, Inc.,* 752 F.2d 1401, 1404 (9th Cir.1985). The fact that voiding the indemnification clause would not alter our analysis of the scope of the school district's duty indicates that this argument is not a response to the school district's issue on appeal, but rather a separate argument. Whether the indemnification clause should be voided is an issue that Patterson could have raised in her direct appeal. Because she did not, we deem it waived.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

[Filed Jun. 2, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A93-0189-CIV (HRH)

REBECCA L. PATTERSON, *et al.*,
Plaintiffs,

vs.

ANCHORAGE SCHOOL DISTRICT, *et al.*,
Defendant.

ORDER

(Motions for Summary Judgment)

Defendants National Education Association-Alaska (NEA-Alaska) and the Anchorage Education Association (AEA) have moved for summary judgment.[1] The motion is opposed.[2] Defendant Anchorage School District (the School District) has also moved for summary judgment on the validity of an indemnification clause.[3] The plain-

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[1] Clerk's Docket No. 34.

[2] Clerk's Docket No. 43. Plaintiffs moved for leave to file their opposition to the defendant's motion out of time. Clerk's Docket No. 51. The motion for extension of time is opposed by the School District, but in the interest of resolving the issues presented by the substantive motions or their merits, the motion for extension of time is granted.

[3] Clerk's Docket No. 47.

tiffs have cross-moved on the validity of the indemnification agreement [4]. Oral argument has been heard. For the reasons stated below, the motion by NEA-Alaska and AEA is granted in part and denied in part, and the indemnity clause is upheld as valid.

Plaintiffs are nonunion school teachers employed by the Anchorage School District. Even though they are not members of the teachers' union, they are required to contribute to the union's collective bargaining efforts on their behalf. The union also carries out some activities unrelated to collective bargaining, such as contributing to political campaigns. Teachers who have declined to join the union may not be required to pay the same amount as union members; they must be charged a lesser amount reflecting a pro-rata portion of the union's expenditures on collective bargaining activities. *Chicago Teacher's Union v. Hudson,* 475 U.S. 292 (1986). *Hudson* reaffirmed the well-settled principle that requiring a nonmember to contribute to the union's ideological activities violates the nonmember's First Amendment Rights.

On September 11, 1992, the union defendants presented the nonmembers with what has become known as a *Hudson* notice. The notice included financial data regarding the union's expenditures, as well as an explanation of the procedures available to nonmembers who object to paying a service fee in lieu of union dues.

The notice informed the nonmember that he is required either to become a member of AEA and pay unified AEA/NEA-Alaska/NEA dues, or to pay a service fee (equivalent to union dues) of $637.00. The nonmember was told that he had the right to object to the use of his fee for purposes unrelated to collective bargaining. The AEA had determined that for the 1992-93 school year,

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[4] Clerk's Docket No. 60.

the service fee chargeable to the nonmember (reduced service fee) would be equivalent to 79.2% of the full union dues. Attached to the notice were financial reports for both NEA-Alaska and NEA that reflected their expenditures for the previous school year, and projected budgets for AEA, NEA-Alaska and NEA for the upcoming school year.

The letter went on to say that the nonmember may pay the full service fee, object and accept the reduced service fee as determined by the Association, or object and challenge the fee before an arbitrator chosen by the American Arbitration Association. If the nonmember did not object, regular monthly deductions based upon the full service fee would be made from his salary. If the nonmember did object, but accepted the computation of the reduced service fee as determined by the AEA, regular monthly deductions of the full fee would be made from his salary and the non-chargeable amount would be rebated to him by NEA-Alaska. A feepayer who did not object or who accepts the reduced service fee as determined by the AEA waived his right to challenge the amount of the fee before an arbitrator. If the nonmember objected and chose to challenge the fee before an arbitrator, regular monthly deductions based upon the full service fee will be made from his salary and placed in an escrow account until the challenge was resolved by the arbitrator. Attached to the letter was a Notice of Objection to be completed and postmarked by November 30, 1992. If the nonmember proceeded to arbitration and prevailed, NEA-Alaska would have released from escrow and sent to the nonmember a check representing the non-chargeable amount as determined by the arbitrator, with interest.

The Notice of Objection presented the objecting nonmember with two options. If the nonmember chose Option 1, he thereby accepted the AEA's calculations and

requested a refund.[5] Choosing Option 2 meant the nonmember wished to proceed to arbitration.[6]

In December 1992, the AEA sent a supplemental notice to nonmembers that included a financial report which reflected its expenditures for the previous school year. The supplemental notice gave the nonmembers until January 11, 1993, to mail a Notice of Objection. Defendants' Motion for Summary Judgment, Clerk's Docket No. 34, exhibits 14, 15, and 16.

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[5] Option 1 reads:

> I object to the Anchorage Education Association receiving funds from the Anchorage School District as a result of my employment with the District which will be used by the Anchorage Education Association for "non-chargeable" activities. I accept the determination that 79.2% of the $637 fee is used for "chargeable" activities. I wish to have the amount of the fee attributable to "non-chargeable" activities returned to me.

Defendants' Motion for Summary Jndgment, Clerk's Docket No. 34, exhibit 5.

[6] Option 2 reads:

> I object to Anchorage Education Association receiving funds from the Anchorage School District as a result of my employment with the District which will be used by the Anchorage Education Association for "non-chargeable" activities. Additionally, I wish to challenge the determination of the amount attributable to "non-chargeable" activities. I request that my challenge be heard by an impartial arbitrator. I understand that the arbitrator may either approve the calculations or choose to increase or decrease the amount attributable to "non-chargeable" activities. I understand that the Anchorage Education Association will retain the full amount of the representation fee it receives in an escrow account until the arbitrator decides the challenge. The Anchorage Education Association will thereafter transmit to me the amount of the fee attributable to "non-chargeable" activities as determined by the arbitrator.

Defendants' Motion for Summary Judgment, Clerk's Docket No. 34, exhibit 5.

The notices specifically referred to *Hudson,* which requires a union to adhere to two basic principles. First, nonmembers have an absolute right not to support speech they disagree with, so the union must not, under any circumstances, use a nonmember's money for ideological purposes. Second, nonmembers have a further First Amendment right to a fair, prompt and effective procedure, both for identifying what sums they are required to pay and, if more than that is collected, for obtaining a refund of the excess. *Hudson,* 475 U.S. at 306-309. *Grunwald v. San Bernardino Sch. Dist.,* 994 F.2d 1370, 1373 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 439 (1993). The plaintiffs challenge both the adequacy of the financial data provided in the attachments to the notice, and the adequacy of the procedures that provide for a refund. They contend that these failures violate their constitutional rights.

Plaintiffs' Fifth Amendment claim

The parties agree that this court is presented with a First Amendment analysis as incorporated in and applied to the states by the Fourteenth Amendment. The plaintiffs also contend that they state a valid Fifth Amendment due process claim.

The plaintiffs in *Hudson* argued that their case should be analyzed under both the First and Fifth Amendments, but the Court concluded that a Fifth Amendment analysis would be superfluous because the First Amendment provided the necessary protection. *Hudson,* 475 U.S. at 304, n.13. In this context there is no meaningful difference between *Hudson* and this case. In all of its post-*Hudson* cases, the Ninth Circuit's due process analysis of agency fee agreements have proceeded under the First Amendment. *See e.g. Grunwald v. San Bernardino Sch. Dist.,* 994 F.2d 1370 (9th Cir. 1993); *Mitchell v. Los Angeles Unified Sch. Dist.,* 963 F.2d 258 (9th Cir. 1992); and *Dean v. Trans World Airline Inc.,* 924 F.2d 805 (9th Cir.

1991). Consequently, this case will be analyzed only under the First, not the Fifth, Amendment.

Arbitration

The plaintiffs' objection to the arbitration provision in the *Hudson* packet is less than clear. They apparently contend that they have a right to participate in the selection of an arbitrator and that they cannot be forced to arbitrate their constitutional challenges. In *Grunwald*, the Ninth Circuit approved the use of the American Arbitration Association procedures and arbitrators in this context. *Grunwald*, 994 F.2d at 1376-77. This precedent forecloses any claim that the plaintiffs have a right to bargain for a particular arbitrator.

The plaintiffs rely on *Hohe v. Casey*, 956 F.2d 399 (3rd Cir. 1992), apparently for the proposition that they cannot be forced to arbitrate their constitutional challenges. The court in *Hohe* began with the premise that exhaustion of state remedies is not a prerequisite to bringing an action under 42 U.S.C. § 1983, *citing Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982). The Third Circuit analyzed a Pennsylvania statute and concluded that it impermissibly required the plaintiffs to submit their constitutional challenges to arbitration.

By contrast, no comparable statute is at issue in this case, and nothing in the defendants' *Hudson* packet requires the plaintiffs to submit their constitutional challenges to arbitration. Although the cover letter and Notice of Objection form (defendants' Motion for Summary Judgment, Clerk's Docket No. 34, exhibits 4 and 5) do not mention the option of filing a complaint in court, neither do they require all objections to be arbitrated as did the statute at issue in *Hohe*. The plaintiffs having presented no authority to the contrary, the court concludes that the arbitration provisions in the defendants' *Hudson* packet are valid and enforceable.

Alleged Constitutional Deficiencies

I. Adequacy of Financial Information

The plaintiffs challenge the defendants' use of a "local unit presumption" in the *Hudson* notice to estimate the chargeable amount for the local association, AEA.[7] The idea behind a local unit presumption is that the local entity does not have to specify its chargeable and non-chargeable expenditures because it normally spends more on chargeable activities than the state-wide or nationwide organization. Thus, the defendants contend that the presumption is to the nonmembers' advantage. Instead of providing an audited report of the AEA's chargeable and non-chargeable activities, the defendants initially provided the plaintiffs with a one page unaudited budget.

The vast majority of the courts that have considered this issue have concluded that the use of the local unit presumption in lieu of audited financial data is unconstitutional. *See e.g., Hohe*, 956 F.2d 399, 409-10; *Tierney v. City of Toledo*, 917 F.2d 927 (6th Cir. 1990); *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 430-31 (6th Cir. 1990), *cert. denied*, 498 U.S. 958 (1990); *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678, 681-2 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1989); and *Bender v. NEA-Alaska*, F92-010 CI, (filed Sept. 29, 1993) (J. Sedwick).

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[7] The language at issue reads as follows:

> The portion of the service fee payable to NEA-Alaska and its local affiliates has been computed as follows: NEA-Alaska evaluated all of its activities and calculated the percentage of the time spent by staff that is attributable to chargeable activities. This percentage was then applied to salaries and administrative expenses. *The NEA-Alaska chargeable percentage has been applied to expenditures of the local association because the local association is presumed to spend the same, if not a larger, portion of its budget on chargeable activities.*

Defendants' Motion for Summary Judgment, Clerk's Docket No. 34, exhibit 6 at 1 (emphasis added). See also additional explanation, exhibit 7 at 6.

The defendants respond that even if use of the local unit presumption in the initial notice was improper, this defect was cured by the supplemental notice sent in December 1992. The defendants rely on *Weaver v. University of Cincinnati*, 764 F. Supp. 1242, 1245 (S.D. Ohio 1991), *affirmed*, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993), in which a union's initial notice was defective. The union then collected the service fees, placed them in an escrow, and commenced with arbitration procedures. The arbitrator ordered the union to issue an amended notice to the plaintiffs that included an independent audit of the School District's chargeable expenditures. The court concluded that the inclusion of the independent audit in the supplemental information afforded the plaintiffs the relief they requested and that no further action on that claim was warranted. *Id.* at 1245.

The plaintiffs in turn rely on *Hohe*, in which the union's notice failed to contain a verification by an independent auditor. The circuit court held that no information subsequently submitted to the court after the fees had been collected could rectify that aspect of the notice because the purpose of requiring the verification in the notice is to give the nonmembers some prior assurance that the fee was properly calculated. *Id.* at 415. Here, the supplemental AEA notice was sent some weeks after the initial deadline for objecting had passed. In this respect, this case is more like *Hohe*. The supplemental notice was sent too late for it to be of use to a nonmember that was considering objecting to the service fee. The court concludes, in accordance with the weight of authority, that the local unit presumption in the initial notice was constitutionally defective, and that the supplemental notice in December 1992, did not cure the defect.

The plaintiffs' next claim is that the law requires auditor verification of the chargeable/non-chargeable breakdown, citing *Hohe* and *Mitchell*. Defendant NEA provided this vertification, but defendants NEA-Alaska and

AEA did not. The defendants cite several cases in support of their position that no such vertification is required.[8] One of the cases, *Dashiell v. Montgomery County, Md.*, 925 F.2d 750 (4th Cir. 1991), contains a useful synopsis of the relevant case law. Two distinct rules of law emerge from a review of these cases. First, virtually every court that has considered the issue has concluded that an independent auditor should not be required to make the legal determination as to that which is chargeable and that which is not. *Id.* at 755. Such a determination is beyond the scope of an auditor's normal function. Second, the proposition supported by *Hohe* and *Mitchell* is that once a union has made the initial determination that an expense should be classified as chargeable or non-chargeable, an independent auditor is required to verify that the claimed amount was actually spent. This accounting task does not require the auditor to make any kind of legal determination.

These two propositions are entirely consistent with one another. The defendants' citations to authority relate to the first proposition, and they have not presented any authority to rebut the second. The court concludes that NEA-Alaska's and AEA's failure to provide auditor verification of their expenses rendered their notices constitutionally defective.

II. Challenged Expenses

The plaintiffs also claim that the notices did not contain enough information to enable them to determine whether certain expenses were improperly categorized as

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[8] *Dashiell v. Montgomery County, Md.*, 925 F.2d 750 (4th Cir. 1991); *Lowary*, 903 F.2d 442 (6th Cir. 1990); *Gwirtz*, 887 F.2d 678 (6th Cir. 1989); *Gilpin v. American Fed'n of State, County and Mun. Employees*, 875 F.2d 1310 (7th Cir. 1988), *cert. denied*, 493 U.S. 917 (1989); *Ping v. NEA*, 870 F.2d 335 (2nd Cir. 1987); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335 (2nd Cir. 1987); and *Bender*, F92-0010 Civ.

chargeable by the NEA. The expenses relate to certain litigation expenses, organizaitonal expenses, and lobbying efforts.[9] In *Lehnert v. Ferris Faculty Ass'n*, —— U.S. ——, 111 S. Ct. 1950 (1991), the Supreme Court observed that the determination of whether a given activity should be chargeable is generally decided on a case-by-case basis, but it provided certain guidelines to aid the lower courts. Chargeable activities must: (1) be germane to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. *Id.* at 1959.

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[9] The challenged determinations read as follows:

> It was further determined that nonchargeable activities and expenditures were related to the following matters:
>
> . . . .
>
> 3) litigation unless specifically related to collective bargaining, contract administration or organizational maintenance;
>
> . . . .
>
> 8) organizing, recruiting new members or establishing new or expanded bargaining units, as opposed to "organizational maintenance" (i.e., attempting to maintain current membership and bargaining units);
>
> 9) reproductive freedom (including abortion and birth control), gun control, anti-flag burning laws, balanced budget amendment, juvenile delinquency prevention and control, line item veto, prayer in school, South African apartheid, energy conservation, youth employment, civil/human rights issues (to the extent they do not affect collective bargaining, contract administration or organizational maintenance), international relations, nuclear arms freeze, tuition tax credits and vouchers, environmental protection measures except to the extent they affect the working conditions of members/feepayers (including the safety of schools), child care, child support enforcement, judicial or executive appointments, dropout prevention, unless it is directly related to handling dropouts in the classroom or school environment, etc.;

Defendants' Motion for Summary Judgment, Clerk's Docket No. 34, exhibit 10 at 39-41.

Lehnert specifically held that litigation expenses that do not concern the dissenting employees' bargaining unit should not be chargeable to the dissenters. According to the notice, the NEA "[a]dministers five programs designed to provide NEA members, and in some programs fee-payers, with comprehensive legal protection and to protect officers and staff from personal financial liability in the event of lawsuits resulting from their authorized work for NEA." Defendants' Motion for Summary Judgment, Clerk's Docket No. 34, exhibit 10 at 5. Roughly one-half of the approximately 17 million dollars attributable to these programs are categorized as chargeable to the dissenters. The information in the notice appears inadequate to assist a nonmember in evaluating whether to challenge the allocation of litigation expenses.

The defendants also claim as chargeable certain expenses for "organizational maintenance". A number of courts have concluded, based on the *Lehnert* factors, that unions may not charge nonmembers for organizing expenses. *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Reese v. City of Columbus*, 798 F. Supp. 463 (S.D. Ohio 1992); *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666 (Ind. App. 1992); and *Browne v. Wisconsin Empl. Relations Comm'n*, 485 N.W.2d 376 (Wis. 1992). The rationale is that the nonmember does not receive any benefit when a union incurs expenses to retain its members. The plaintiffs' position appears reasonable and in accordance with the cited case law.

Lastly, NEA classifies certain lobbying expenditures as chargeable. The Supreme Court in *Lehnert* validated lobbying expenditures only for the purpose of "ratification or implementation of a dissenter's collective bargaining agreement." *Lehnert*, 111 S. St. at 1959. The notice appears inadequate to enable a nonmember to determine whether the lobbying expenses at issue should be chargeable.

These three challenges were presented in the plaintiffs' opposition brief, and are not the subject of any pending

motion. The defendants have not briefed these issues, and the court offers the above comments only as tentative observations, not rulings.

III. Alleged Flaws in Procedures

Under the system offered by the unions in this case, when a nonmember formally objects to paying the full union fee, he must submit the full fee to the union, which then places it in an interest bearing escrow account pending resolution of the arbitration. The plaintiffs contend instead that they are entitled to an immediate reduction of their fee as soon as they make their objections known.

In *Grunwald*, the Ninth Circuit considered a challenge to an escrow arrangement remarkably similar to the arrangement in this case. The plaintiffs in *Grunwald* were nonmember school teachers who objected to paying an agency fee to the local teachers' union. The union required payroll deductions equal to full union dues (i.e. no advance reductions). It had "Option I" and "Option II" objections available to feepayers which are identical with those in the instant action. The Ninth Circuit recognized that *Hudson* expressed a strong preference for identifying nonunion members early enough so that the deduction-escrow-refund procedure could be avoided altogether. The Ninth Circuit reasoned:

> To employ the more cumbersome and intrusive deduction-escrow-refund procedure, the union must provide an "adequate explanation," which we interpret to mean that the union must show that the preferred method of doing things is impossible or, at any rate, far more costly or cumbersome.

Grunwald, 994 F.2d at 1375-76. *Grunwald* establishes that in the Ninth Circuit, the use of an escrow account pending a decision by an arbitrator is constitutionally valid, as long as the union provides an adequate explanation for using the escrow-refund procedure.

The Ninth Circuit found that the school term itself provided an adequate explanation for the use of escrow accounts. The court noted that the School District hired many new teachers each year, virtually all of whom start work at the beginning of September. Thus, a few weeks would pass before the union obtained the addresses of the new employees and identified which employees would choose to be agency feepayers that year. The court found that under the circumstances it would be impractical for the union to separate members from nonmembers and determine the affiliations and addresses of the new teachers before the first monthly paycheck, which was issued at the end of September. The union in *Grunwald* sent out a notice to agency feepayers advising them of their rights no later than October 15.

Here, the initial notice was sent in the second week of September. This comports with the scheme approved by the Ninth Circuit in *Grunwald*. In that case, as in this one, the fluctuating nature of public school employment provides an adequate explanation for using the escrow method rather than an immediate reduction. In accordance with *Grunwald*, the plaintiffs' contention that they are entitled to an advance reduction of their fee is rejected.

Validity of Indemnification Agreement

Plaintiffs and the School District have cross-moved for summary judgment on the issue of whether the indemnification clause in the collective bargaining agreement is void as against public policy. The collective bargaining agreement was entered into by the Anchorage School District and the AEA in May of 1992. The indemnification clause provides:

> D. The association agrees to indemnify and hold the Board [10] harmless against any liability and pay all costs and attorney's fees which may arise by reason of any action taken by the Board in complying with the provisions of this article. This indemnification shall not apply to any claim, demand, suit or other form of liability which may arise as a result of any negligence or willful misconduct by the Board.

Collective Bargaining Agreement § 719(D), attached as exhibit 51 to Defendants Anchorage Education Association and NEA Alaska's Memorandum in Opposition to Plaintiffs' Cross-Motion for Summary Judgment, Clerk's Docket No. 68. The second sentence of this clause states that there is no agreement to indemnify if the School District engages in any negligent or willful misconduct. As the AEA points out, the School District will be indemnified and held harmless under this agreement only where it abides by the withholding terms of the union contract, does no wrong and is sued anyway.

The plaintiffs contend that indemnification clauses in agency fee agreements are against public policy because they insulate an employer from financial liability for its constitutional torts. Although the plaintiffs have cited several cases where indemnification clauses were stricken as contrary to public policy, *Weaver*, 970 F.2d at 1536-38 (6th Cir. 1992) and *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70 (2nd Cir. 1982), the clauses in those cases were much broader and provided for indemnification even where the indemnitee was at fault. The plaintiffs have provided no authority for the proposition that the clause in this case is against public policy. The School District's motion is granted and the plaintiffs' cross motion is denied.

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[10] The reference to the "Board" is to the Board of Education of the Anchorage School District.

Summary

The defendants' (NEA-Alaska and AEA) motion for summary judgment, Clerk's Docket No. 34, is granted insofar as it requests the following rulings:

1) the plaintiffs do not have a valid Fifth Amendment claim;

2) the plaintiffs do not have a right to bargain for a specific arbitrator and use of the American Arbitration Association is permissible; and

3) the plaintiffs are not entitled to an advance reduction of their service fees in this case— use of the escrow/refund procedure is permissible.

The same motion, Clerk's Docket No. 34, is denied in the following respects:

1) use of the local unit presumption is impermissible and the supplemental notice of December 1992, did not cure the defect; and

2) the defendants must provide an auditor verification of NEA-Alaska's and AEA's expenses.

The School District's motion, Clerk's Docket No. 47, on the validity of the indemnification agreement is granted, and the plaintiffs' cross-motion on the same issue, Clerk's Docket No. 60, is denied.

DATED at Anchorage, Alaska, this 1 day of June, 1994.

/s/ H. Russel Holland
United States District Judge

APPENDIX C

[Filed Nov. 20, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A93-0189-CV (HRH)

REBECCA L. PATTERSON, *et al.*,
Plaintiffs,

vs.

ANCHORAGE SCHOOL DISTRICT, *et al.*,
Defendants.

ORDER

(Motion for Summary Judgment)

Plaintiffs have moved for summary judgment.[1] This motion is opposed.[2] Defendants Anchorage School District, Christal Roberts and Leland Wilson, have cross-moved for summary judgment.[3] This motion is opposed.[4] Oral argument has been heard on both motions.

Plaintiffs are seven nonunion school teachers employed by the Anchorage School District ("ASD"). Plaintiffs are required to pay a pro rata share for the union's collective bargaining on their behalf. This pro rata share is known as an agency fee. *Chicago Teacher's Union Local No. 1,*

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[1] Clerk's Docket No. 81.

[2] Clerk's Docket No. 97, 106.

[3] Clerk's Docket No. 96.

[4] Clerk's Docket No. 102.

AFT, AFL-CIO v. Hudson, 475 U.S. 292 (1986). Plaintiffs claim the procedure employed by the defendants for paying this agency fee contains a number of defects, some of which are constitutional, and have filed an action challenging this procedure.

The defendants in this action are split into two groups. The first group includes ASD, Christal Roberts, the acting superintendent, and Leland Wilson, the executive director of instructional support programs and certified labor relations. The second group of defendants are the Anchorage Education Association ("AEA") and the National Education Association-Alaska, Inc. ("NEA-Alaska") (collectively "union" or "union defendants"). The union defendants have filed a cross-claim against the school district defendants seeking to have plaintiffs fired for failure to contribute to the collective bargaining agreement costs.[5]

The majority of pertinent facts are set out in this court's order of June 2, 1994.[6] The following facts are also necessary for adjudication of this matter. One of the teachers challenging the agency fee paid the full union dues. The union has returned the portion it claims is not chargeable. This plaintiff seeks full restitution of the agency fee. The union and ASD entered into an indemnity contract which reads:

> The Association agrees to indemnify and hold the Board harmless against any liability and pay all costs and attorney's fees which may arise by reason of any action taken by the Board in complying with the provisions of this article. This indemnification shall not apply to any claim, demand, suit or other form of liability which may arise as a result of any negligence or willful misconduct by the Board.

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[5] Clerk's Docket No. 6.

[6] Clerk's Docket No. 77.

Defendants Anchorage Education Association and NEA Alaska's Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment, Clerk's Docket No. 68, Exhibit 51 at section 719D. Defendant Wilson reviewed the *Hudson* notice and obtained a copy for the School Board. Defendant Anchorage School District's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 97, Exhibit 1, ¶ 3.[7] ASD claims that it was provided with a list of teachers who had not paid the agency fee. *Id.*, ¶ 4. The AEA informed ASD that all teachers on the list had received the *Hudson* packet. *Id.*, ¶ 5. A warning letter was sent by ASD to the noncomplying teachers. *Id.*, ¶ 6. This suit was then filed. *Id.*, ¶ 7. ASD suspended all action against the plaintiffs pending the outcome of this litigation. *Id.*, ¶ 9. A number of non-compliant teachers did not join this suit. *Id.*, ¶ 10. The AEA sought, via arbitration, to have these teachers dismissed. *Id.* ASD lost the above arbitration, but has still not fired the non-compliant teachers who are not parties to this suit, rather a second warning letter was sent. *Id.*, ¶ 12.

The first issue to be addressed is whether plaintiffs can be required to arbitrate. The agency fee and arbitration

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[7] Wilson stated in full:

> In November, 1992, I had looked at and verified that the AEA had compiled a "Hudson packet" for distribution to teachers within the District. The Hudson packet was quite thick, containing over one hundred pages. The NEA had considerable experience with using Hudson notices, and substantial legal resources to rely on to fashion a constitutionally valid Hudson notice and packet. After receiving the list of non-compliant teachers, a member of the School Board requested a copy of the Hudson packet. I obtained a copy of the packet for the School Board and reviewed this with the Board.

Defendant Anchorage School District's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 97, Exhibit 1, ¶ 3.

challenge system at issue is an outgrowth of the Supreme Court's *Hudson* decision. The Supreme Court in *Hudson* reviewed a procedure for challenging agency fees. The Supreme Court advanced three guidelines: (1) a remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that a dissenter's funds may be used temporarily for an improper purpose;[8] (2) nonmembers must be provided with adequate information about the basis of the agency fee; and (3) a challenge procedure must provide a reasonably prompt decision by an impartial decision-maker. *Hudson*, 475 U.S. at 304-7. As to the third procedural guideline, the Supreme Court stated "we think that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice." *Id.* at 308 n.21. The Supreme Court also noted that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action." *Id.* Arbitration generally, therefore, is allowed. This court will consider whether arbitration is called for in this specific situation.

Some of the issues this court is considering in the instant motions have in essence been decided for plaintiffs in this court's Order of June 2, 1994.[9] At that time this court did not have a motion from plaintiffs requesting summary judgment. This court now grants plaintiffs sum-

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[8] This impropriety is non-union members having their money used for ideological purposes with which they do not agree. *Hudson*, 475 U.S. at 295.

[9] Plaintiffs have raised previously and lost the following claims. The first is the "advance rebate" issue. Plaintiffs claim that dissenters are entitled to an advance deduction of their service fees. Plaintiffs' Motion for Summary Judgment, Clerk's Docket No. 81 at 4. The second issue is the applicability of the Fifth Amendment to this controversy. *Id.* at 5. This court ruled against plaintiffs on both of these issues. Order of June 2, 1994, Clerk's Docket No. 77 at 17. The court declines to revisit these issues.

mary judgment that the notice provided plaintiffs was unconstitutional due to the use of the "local unit presumption",[10] which was not rectified by a supplemental notice, and due to the failure to provide an auditor verification.[11]

The Ninth Circuit in *Grunwald v. San Bernardino Sch. Dist.*, 994 F.2d 1370, explained the basic principles that emerge from reviewing the case law on agency shop agreements:

> First, nonmembers have an absolute right not to support speech they disagree with, so the union must not, under any circumstances, be able to use their money for ideological purposes. Second, nonmembers have a further First Amendment right to a fair, prompt and effective procedure, both for identifying what sums they are required to pay and, if more than that is collected, for obtaining a refund for the excess. For convenience, we will refer to the first of these as the substantive First Amendment right and to the second as the procedural First Amendment right.

Id. at 1373 (internal citations omitted). In this case the parties often refer to issues of chargeability and notice. Chargeability concerns the substantive First Amendment right, while notice concerns one of the procedural First Amendment rights.

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[10] Order of June 2, 1994, Clerk's Docket No. 77 at 8.

[11] Plaintiff, in the instant motion, appears to phrase the auditor verification argument in broader terms than this court's holding in the June 2, 1992, Order. Plaintiff seems to claim that an auditor should make a determination about whether an item should be chargeable or unchargeable. Plaintiffs' Motion for Summary Judgment, Clerk's Docket No. 81 at 10. This court held and continues to hold that an auditor is not required to make such a determination. An auditor's task is merely to determine whether the claimed amount was actually spent. Order of June 2, 1994, Clerk's Docket No. 77 at 10.

An important preliminary issue to be decided is in what situations a court should decide chargeability issues where, as here, there has been a finding of constitutionally insufficient notice. Plaintiffs claim that since the notice provided by the unions was constitutionally defective, plaintiffs had no duty to use the arbitration procedures. Plaintiffs' Motion for Summary Judgment, Clerk's Docket No. 81 at 29-31.

In *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), a union's challenge procedure called for arbitration. The plan was found to have constitutionally defective notice. The *Weaver* plaintiffs claimed the arbitrator's decision should not have been ratified. The Sixth Circuit stated:

> [C]hargeability issues may be decided by an arbitrator whose selection satisfied *Hudson*, even if other portions of a union's collection plan do not satisfy *Hudson*, before a district court considers a constitutional challenge to the collection plan.

Id. at 1535. In *Hudson v. Chicago Teachers Union, Local 1*, 922 F.2d 1306 (7th Cir. 1991) the Seventh Circuit (on remand from the Supreme Court) addressed where chargeability issues should be determined:

> Contrary to the plaintiffs' position [that chargeability issues should be decided in the federal courts where there has been defective notice], *Hudson* [the Supreme Court decision] did not contemplate that federal courts would be required, on the basis of notice, to pass on the legality and accuracy of every element of the fee calculation before any fees could be collected. Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending.

Id. at 1314. This court has also recently been faced with this issue. In *Bender v. NEA-Alaska*, F92-010, (D. Alaska, Sept. 30, 1993),[12] Judge Sedwick stated:

> Plaintiffs [non-union teachers] challenge the union's use of arbitration in this matter because they have never consented to arbitrate the amount defendants could charge as an agency fee. Rather, they seek to ignore the arbitration process provided by defendants [the union] and to litigate *de novo* the validity of the agency fee in this action. Plaintiffs confuse the roles of arbitration and judicial review within the context of union/nonmember agency fees. Arbitration plays a limited role in protecting and preserving nonmembers' constitutional rights. Arbitration satisfies a union's constitutional obligation to provide due process to ensure that the agency fee it seeks to collect is not used to support ideological causes in violation of nonmembers' First Amendment rights. Nonmembers may challenge the validity of the unions' determination of chargeable and nonchargeable expenses and the total amount of the fee. Arbitration, however, is not the appropriate forum to adjudicate constitutional issues surrounding the fee. Federal courts remain the proper forum to evaluate the constitutional adequacy of the union's notice and fee procedures. Importantly, arbitration is not a precondition to the nonmembers' § 1983 action to challenge the constitutionality of the unions' actions. *See Patsy v. Florida Bd. of Regents,* [457 U.S. 496] (1982). Nor does an arbitrator's decision preclude a court from examining the constitutionality of the union's actions in assessing and collecting fees from nonmembers. *Hudson*, [475 U.S. at 308, n.21] ("[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action.")

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[12] This document is located at Motion for Summary Judgment, Clerk's Docket No. 34, Exhibit 26.

> Moreover, should the arbitration result in an unfavorable decision for the nonmembers, judicial review remains available. *See* 9 U.S.C. § 9 and 10.

Id. at 20-21.

Plaintiffs claim that the above cases do not stand for the proposition that arbitration *must* be allowed before going to the federal courts. Plaintiffs misread the cases. Plaintiffs cite *Lucid v. City and County of San Francisco*, 774 F. Supp. 1234 (N.D. Cal. 1991) for the proposition that "courts regularly, appropriately consider the chargeability standard applied in challenges to the constitutional adequacy of a union's initial notice and procedures." Plaintiffs' Reply to Defendants' Opposition to Their Motion for Summary Judgment, Clerk's Docket No. 101 at 12. In *Lucid,* however, the union did not have an arbitration system in place and failed to inform the plaintiffs of their right to arbitrate. 774 F. Supp. at 1239. Plaintiffs do not cite any precedent for the proposition that federal courts should decide chargeability even where there is a constitutionally sufficient arbitration procedure in place.

The court in these matters should determine if there is a constitutional notice or constitutional arbitration procedure problem. If there is a notice problem, but not a procedure problem, then the nonmembers should be required to arbitrate. If there is a procedure problem, then the best course of action is to require the union to fix the problem before requiring arbitration. In this case, the procedures which the parties adopted are constitutional even though the local unit presumption was employed. Order of June 2, 1994, at 9.[13] This defect was one of inadequate notice. *Id.* Similarly, the union provided the plaintiffs with inadequate information as to the chargeability of expenditures. *Id.* at 10, 13. These were also defects of notice, not procedure.

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[13] Clerk's Docket No. 77.

Plaintiffs again seek to challenge the constitutionality of the arbitration procedures. The alleged defects are: (1) the two option system violates the rights of those teachers who wish to challenge the collective bargaining fee; (2) application of the arbitrator's determination of the State union's chargeable percentage to the local union; and (3) the lack of an advance reduction for dissenters. Plaintiff's Motion for Summary Judgment, Clerk's Docket No. 81 at 19-29. Item 2 is merely the "local unit presumption" and this court has already ruled on this issue in plaintiffs' favor. Order of June 2, 1994.[14] As to Item 3, this court will not revisit this advance reduction issue, having already decided it in favor of the union. *Id.* at 13-15.

Plaintiffs' remaining procedural argument is that a challenge procedure should not allow a potential increase in the agency fee. Plaintiffs claim that a teacher who does not challenge the fee pays 79.2% of the $637 fee, while a teacher that challenges the fee could pay more, depending on the arbitrator's decision to raise or lower the fee. Plaintiffs misrepresent the challenged procedure. The challenged procedure expressly provides that:

> If the Impartially-Determined Service Fee is larger than the Association-Determined Service Fee, the amount paid for the service fee year by service fee-payers shal [sic] not be increased.

Defendants NEA-Alaska and Anchorage Education Association Motion for Summary Judgment, Clerk's Docket No. 34, Exhibit 7 at 6. In arbitration, the union can at most recover the percentage charged to all employees, in this case 79.2% of the $637 fee.

Plaintiffs seek the following relief: (1) a judicial declaration that the union defendants have not complied with the constitution; (2) permanent injunctive relief against all fee demands; (3) restitution of the agency fee for a

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[14] Clerk's Docket No. 77 at 9.

teacher who earlier paid the fee; (4) costs and attorney fees. Plaintiffs' Motion for Summary Judgment, Clerk's Docket No. 81 at 35-42. Plaintiffs want a full refund of the escrowed fees. *Id.* at 37. In the event a full refund is not granted, plaintiffs request that this court determine the amount of a refund, rather than assign such a decision to the arbitrator. *Id.* at 39.

The union defendants' claims that only the nonchargeable portion of the fee should be returned to the plaintiffs. Defendants' claim that their constitutional violations were not wilful and that plaintiffs should not receive a windfall.

In *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113 (1963), the Supreme Court held that under the Railway Labor Act a nonunion employee was entitled to a remittance of the portion of the fees used for union political expenditures. The *Allen* remedy was cited with approval in *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 239 (1977), a constitutional case, similar to the instant action.

In *Gilpin v. AFCSME, AFL-CIO*, 875 F.2d 1310 (7th Cir. 1989), a union was found to have violated both the notice and procedural requirements for a challenge procedure over a two year period. *Id.* at 1312. An arbitrator later found that the union undercharged 5% for one year, and overcharged 1% for the next year. *Id.* The union returned the 1% overcharge to all teachers, even those that did not sue. *Id.* Plaintiffs in *Gilpin* sought full restitution of their fees for the challenged years. The Circuit denied the request. *Id.*

In *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), the Sixth Circuit denied a similar request. The Circuit noted that this remedy would undermine the policy that every employee contribute to the cost of collective bargaining. *Id.* at 1533. The Circuit stated that *Hudson* did not disturb the *Allen* holding that the

proper remedy is a refund of the nonchargeable portion of the fee. *Id.*

This court's substantive rulings dictate the relief which is appropriate in this case. As detailed above, the court has concluded that there were notice problems as between the union defendants and the plaintiffs; but the procedures which the union put in place to deal with the payment and collection of agency fees has been approved. The union defendants have at all times been willing to arbitrate the differences between them and plaintiffs. The court concludes that the appropriate remedy for this case at this time is to order arbitration. The court concludes that, at this time, the plaintiffs are not entitled to any relief other than a declaration of their rights as set out in this courts order of June 2, 1994,[15] and this order. The court declines to rule on the issue of attorney's fees until final judgment is entered and an appropriate motion for attorney's fees is filed pursuant to D. Ak. LR 54.3.[16]

Plaintiffs claim that defendant Anchorage School District has been either negligent or wilful in failing to prevent a constitutional violation against the teachers. Plaintiffs therefore claim that the indemnification agreement between ASD and the unions is unenforceable. Plaintiffs' Motion for Summary Judgment, Clerk's Docket No. 81 at 42. Plaintiffs claim that ASD was negligent in that it breached a duty to protect plaintiffs from constitutional violations.[17] District defendants oppose this mo-

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[15] Clerk's Docket No. 77.

[16] On the subject of attorney's fees, plaintiff retained an ideological group to represent them. The National Right to Work Legal Defense Fund, Inc., has, in briefing and arguing this matter, misstated the holdings of cases and ignored other clear, applicable precedents. The Defense Fund's tactics made this case much more difficult that it needed to be.

[17] Plaintiffs did not plead "wilfulness or negligence" in the complaint, rather they merely mentioned the existence of the indemnification agreement between ASD and AEA. Complaint, Clerk's

tion and have crossed-moved for summary judgment on the same issues.

Plaintiffs seek attorney's fees, costs, nominal damages, and a permanent injunction preventing any voluntary compliance with the indemnification agreement. Plaintiffs claim the permanent injunction is necessary to insure ASD pays its "fair share" of the cost of violating plaintiffs' constitutional rights.

Defendants claim that plaintiffs are not a proper party to sue on a contract of indemnity and that they have met their constitutional duty and are therefore not negligent.

The question of whether plaintiffs may challenge this indemnity agreement is quickly disposed of. Nonunion members have overturned indemnity agreements as contrary to public policy. *E.g., Weaver*, 970 F.2d at 1536-37. A rationale for this result is that public employers should not be shielded from their constitutional torts. For this reason, plaintiffs must be able to challenge whether ASD's wilfulness or negligence underlies this suit. A contrary ruling would allow those in plaintiffs' situations to challenge a facially invalid indemnification agreement, but would not allow a challenge to a facially valid indemnification agreement. This would lead to an anomalous result.[18] Plaintiffs are a proper party to challenge whether ASD was either wilful or negligent.

Docket No. 1, ¶ 19. Plaintiffs filed an amended complaint and again did not claim "wilfulness or negligence" on the part of the district. Plaintiffs' First Amended Class Action Complaint, Clerk's Docket No. 20, ¶ 26. ASD, however, has consistently been aware that the issue of negligence and wilfulness have been at issue and therefore is not prejudiced by this court allowing plaintiffs' claim to proceed. The district defendants also cross-moved for summary judgment on the issue. Defendant Anchorage School District's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 97 at 1-2. This court will therefore consider the "wilfulness or negligence" claim properly before it.

[18] Assume in situation 1 there is a school district that is negligent in protecting non-union school teachers' rights and there is a facially

Turning to the merits of plaintiffs' claims against ASD, the first question this court is faced with is, does ASD have a duty to protect the constitutional rights of plaintiffs? The answer is yes. In *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), the Sixth Circuit stated:

> "Under *Hudson*, the public employer, not the union, has the primary duty to ensure that the plan is constitutionally valid. *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1192 (7th Cir. 1984), *aff'd* [475 U.S. 292] (1986); *Lowary v. Lexington Local Bd. of Educ.*, 704 F.Supp. 1430, 1449 (N.D.Ohio 1987), *reversed on other grounds*, 854 F.2d 131 (6th Cir. 1988).

Id. at 1537-38 (quoting *Cramer v. Marsh*, unpublished decision, located at 1990 WL 169640, 1990 U.S. App. Lexis 21616). In *Lowary v. Lexington Local Bd. of Educ.*, 704 F. Supp. 1430 (N.D. Ohio 1987), *rev'd on other grounds*, 854 F.2d 131 (6th Cir. 1988), a case similar to the instant action, the school board argued:

> [T]hey do not have an independent duty to provide a separate rebate procedure nor an independent duty to audit the union's financial determinations.

704 F. Supp. at 1449. The court stated:

> The Court finds that the essence of the Board's argument is that they are only obligated to follow what the union instructs them to do, and thus they avoid liability for any wrongful act as long as a

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invalid indemnification agreement. That agreement would be void as against public policy. This result makes public employers responsible for their constitutional torts. Assume in situation 2 there is a school district that is negligent in protecting non-union school teachers' rights, but the indemnification agreement is not facially invalid. In this situation, if plaintiffs were not a proper party, then no one would bring an action. This second result would insulate a public employer from its constitutional torts.

> union was the impetus of the action. . . . *Hudson* implicitly recognizes that it is the government employer and the union who share the duty in establishing a constitutionally valid fair-share fee procedure. The union's duty, after all, is derivative to the fact that the employer is a governmental actor. To permit a public employer to escape any duty in the implementation of the plan, would impose a governmental standard of conduct on a purely private entity. *Hudson* and cases that follow simply do not support such a conclusion.

Id.

The clearest case in which a court held that a public employer has a duty is *Jordan v. City of Bucyrus, Ohio*, 739 F. Supp. 1124 (N.D. Ohio 1990). In that case, the nonunion employees brought an action challenging the constitutionality of the agency fee procedures against the city only. *Id.* at 1125. The city moved to dismiss for failure to join an indispensable party—the union. *Id.* The court denied the motion, holding "the City had independent constitutional obligations toward non-union employees under [*Hudson*]. *Id.* This court holds that ASD owes some duty to plaintiffs.

The second and more difficult question is, what duty does ASD owe plaintiffs? In *Hudson*, the Supreme Court stated:

> [T]he agency shop itself is "a significant impingement on First Amendment rights," the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights.

292 U.S. at 307-8, n.20 (internal citation omitted).

In *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), *remanded to*, 131 L.R.R.M. (BNA) 26654 (N.D. Ohio, 1988), *aff'd in part, rev'd in part*, 917 F.2d 927

(6th Cir. 1990), nonunion police officers challenged the collection of an agency fee. In *Tierney*, the City of Toledo enacted an agency shop ordinance that called for a service fee for non-union members. *Id.* at 1500. The statute delegated the responsibility for creating a challenge procedure to the union. *Id.* at 1500-1. The Sixth Circuit, in reference to the overall scheme of an ordinance and a union created challenge procedure stated:

> Plainly the City of Toledo owes a duty to its non-union employees to assure that its ordinance will not permit the union to deprive them of their rights under the First and Fourteenth Amendments. [citing *Hudson*, n.20] Beyond that, however, we do not endeavor to allocate which procedural minima or guidelines must be contained in the ordinance and which may properly be incorporated in the [union]'s plan.

Id. at 1505.

In *Dixon v. City of Chicago*, 669 F. Supp. 851 (N.D. Ill. 1987), a public employer/agency fee case, the court stated:

> The court rejects the [public employer]'s arguments that it itself has no duty to ensure or establish the constitutionally adequate procedure described by *Hudson* for two reasons. First, the logic of *Hudson* itself contradicts this argument. Action under color of state law is a necessary element of a § 1983 claim. The administration of an agency shop by a public employer constitutes such state action, the Court in *Hudson* implicitly acknowledged, when it upheld the plaintiff's § 1983 claim against the Union and school board there. After all, without such state action, plaintiffs might be precluded from challenging fair share questions. . . .
>
> Second, the [public employer]'s argument is contrary to the express language of *Hudson*, where the

> court held that "the *government* and union have a responsibility to provide procedures that minimize the impingement [of first amendment rights] and that facilitate a nonunion employee's ability to protect his rights." [292 U.S. at 307-8, n.20.] Given this express declaration of governmental responsibility, the court finds the [public employer]'s arguments to be without merit.

Id. at 852-53 (emphasis added by *Dixon* court, footnote corrected).

In *Jordon*, the court noted that "[t]he constitutionally mandatory pre-collection and rebate procedures are clearly set forth in [*Hudson*] and its progeny." *Jordan*, 739 F. Supp. at 1126. The court stated "[d]efendant City admits that *it* has not adopted, implemented or ensured that any precollection disclosure, rebate and escrow procedures were in place for non-Union employees." *Id.* at 1127. The court held it "has no doubt that in the present situation the City's failure to ensure compliance with those requirements constitute a clear violation of plaintiffs' constitutional rights." *Id.* at 1126-27.

In *Mitchell v. Los Angeles Unified School District*, 739 F. Supp. 511 (C.D. Cal. 1990), the court concerned itself solely with the notice requirement of *Hudson*. *Id.* at 513-14. In *Mitchell*, the court refused to grant summary judgment on the union's claim of sufficient notice. *Id.* at 516. The court also rejected a motion by the School District seeking dismissal. *Id.* The court stated "[u]nder *Hudson*, a public employer, as well as the public employees union, has a responsibiilty to see to it that adequate procedures are provided which minimize the impingement of non-members' constitutional rights." *Id.*

This court reads the holdings of cases such as *Mitchell* and *Jordan* to stand for the proposition that a public employer has a duty to take reasonable precautions to make certain notice is sufficient and procedures are in place

that protect the First Amendment rights of non-union members.

ASD claims that it does not have an affirmative duty to protect the rights of plaintiffs. It points to *Ellis v. Western Airlines, Inc.*, 652 F. Supp. 938 (S.D. Cal. 1986). In *Ellis*, an employee sued an employer and a union under the Railways Labor Act. In *Ellis*, the employee refused to pay an agency fee until the employer provided *Hudson* safeguards. *Id.* at 939-40. The court said of the employer's (Western Airlines) position:

> Western is a peripheral defendant, which only opposes the entry of a judgment that would create an affirmative obligation for it to "verify, review and/oversee that the agency fees . . . do not include amounts spent for non-collective bargaining purposes." Further, Western opposes any judgment declaring that it should "take any action with regard to Plaintiff's employment status because of his failure to pay agency fees."

Id. at 942. The court held:

> Western's objections are meritorious. This Memorandum Decision and Order do not create any affirmative duty for Western.
>
> Western may, however, be required to insert as a provision of the collective bargaining agreement the remedy that this court ultimately approves as consistent with *Hudson*.

Id. ASD claims that this case addresses the duty of an employer "to review and oversee the union's calculation, notice, and collection procedures of an agency fee." Defendant Anchorage School District's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 97 at 12. ASD reads *Ellis* too broadly; the first passage makes clear that the court

was holding that Western had no duty to review the *chargeability* of agency fees. This court reads the "no affirmative duty" passage to mean that Western was not required to either review chargeability determinations or fire the plaintiff. This court further notes Western could be required to change the collective bargaining agreement. The reason the collective bargaining agreement needed to be changed was because the union did not provide notice and procedures as required by *Hudson*. *Id.* at 942. This court therefore reads *Ellis* as consistent with the duty it has found on a public employer. The public employer is not responsible for reviewing chargeability determinations of a union, but it is responsible for taking reasonable precautions to make certain notice and procedures are in place that protect the First Amendment rights of non-union members.

ASD further claims "[t]o the extent any duty exists, it is limited to a review of the constitutionality of the agency fee agreement." Defendant Anchorage School District's Memorandum is Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 97 at 6. ASD claims that "[t]o hold otherwise would directly involve the employer with regulating internal administrative affairs of a union, a result in conflict with fundamental principles of labor law." *Id.* at 7. ASD cites *Social Services Union, Local 535 v. North Bay Dev. Disabilities Serv., Inc.*, 287 NLRB No. 129, 127 LRRM (BNA) 1184 (1988) (1988 WL 213668), for the proposition that internal affairs of labor organizations are not mandatory subjects of bargaining. The NLRB, interpreting the National Labor Relations Act, stated:

> One subject specifically regarded by Congress as an internal affair of labor organizations is that of the amounts of fees established and assessed on employees. Congress ultimately rejected a House-passed "proposal that would have regulated union proce-

> dures for . . . assessing dues. . . . *NLRB v. Financial Inst. Employees*, [106 S. Ct. at 1015, n.11], because, "Senate conferees . . . felt that it was unwise to authorize [the NLRB] to undertake such elaborate policing of the internal affairs of unions."

Id. at WL *5. This court will assume that this policy consideration of the National Labor Relations Act applies to this constitutional question. If this court were to require ASD to determine if the union's fees are in fact constitutionally chargeable, then there would be a problem with ASD interfering with internal union affairs. This court does not require ASD to interfere with chargeability determinations of the union, however, ASD's duty is to take reasonable steps to insure that the *Hudson* notice and the procedures for challenging an agency fee are constitutional.

This duty on ASD does not require it to interfere with internal union affairs. This court holds that to meet its duty in agency fee situations, ASD must exercise reasonable care to determine that the notice and procedures are sufficient. A way to do this would be to have ASD's lawyers analyze the documents to make certain that there are no constitutional procedural or notice infirmities such as the use of unaudited information as to expenditures, a local unit presumption, or an arbitrator that is picked by the union. If these infirmities are present, ASD should insist the union change them. ASD is the agent of the state and therefore it has the power and the responsibility to exercise reasonable care to insure that constitutional notice and a constitutional procedure are provided to non-union members, so that the non-union members have the information and a procedure to protect their First Amendment rights.

ASD also notes that the Supreme Court has placed the burden of proof of the validity of agency fees on the union. *See Abood v. Detroit Bd. of Education*, 431 U.S. 209, 239-40 n.40 (1977) (quoting *Railway Clerks v.*

Allen, 373 U.S. 113, 122 (1963), "'Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of providing such proportion.'") ASD claims that this means the union must ensure that "agency fee calculation, collection, and notice procedures are constitutional." Defendant Anchorage School District's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 97 at 9. ASD states that the above, when combined with the policy of avoiding interference with internal union affairs, leads to the conclusion "that the employer should not bear the burden of independent review of agency fee procedures." *Id.* Again, this court concludes that ASD has a duty of independent review of agency fee procedures and notices which it can carry out without interfering with internal union affairs. The burden of proof on the union for the calculation of fees is a truism. This court agrees that such a burden is on the union. ASD does not have a duty to determine if the fees contained in a *Hudson* notice are chargeable or nonchargeable and auditors have the responsibility of verifying union expenditures. ASD's duty is to exercise reasonable care in ensuring that the notice and procedures comply with constitutional requirements.

On the undisputed facts of this case, as a matter of law, this court concludes ASD breached its duty and therefore is prohibited from enforcing its indemnity agreement with the union. Plaintiffs' motion for summary judgment is granted in part and denied in part. The district defendants' motion for summary judgment is granted in part and denied in part.

Counsel shall confer and submit a jointly proposed declaratory judgment in accordance with this order on or before December 20, 1995. If counsel are unable to

agree, plaintiffs and defendants shall, at the specified time, lodge separate proposed judgments.

DATED at Anchorage, Alaska, this 20 day of November, 1995.

/s/ H. Russel Holland
United States District Judge

APPENDIX D

[Filed Dec. 4, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A93-0189-CV (HRH)

REBECCA L. PATTERSON, *et al.*,
Plaintiffs,

vs.

ANCHORAGE SCHOOL DISTRICT, *et al.*,
Defendants.

ORDER

(*Motion to Reconsider*)

Plaintiffs move for partial reconsideration of the court's order of November 20, 1995,[1] deciding cross-motion for summary judgment.

Plaintiffs suggest that there is yet pending before the court but undecided a motion for class certification. Plaintiffs are wrong. The motion was decided by order filed September 28, 1994.[2]

Plaintiffs raise a question concerning whether or not arbitration could result in the plaintiff teachers paying a higher service fee to the union. The court concedes that an arbitrator might very well find that the union had understated the costs which might appropriately be included in a service fee. However, were that to happen, the serv-

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[1] Clerk's Docket No. 111.

[2] Clerk's Docket No. 80.

ice fee procedure and policy (fee procedure) applicable in this case places a monetary "cap" on the service fee. Thus, although an arbitrator might determine that the fee could have been higher with a full allocation of chargeable expenses, the arbitrator's award must be limited by the fee procedure.

Finally, plaintiffs urge the court to reconsider ordering arbitration on the basis of certain supplemental authorities. The court has considered these authorities and declines to alter its view that arbitration should proceed.

The motion for reconsideration is denied.

DATED at Anchorage, Alaska, this 4 day of December, 1995.

/s/ H. Russel Holland
H. RUSSEL HOLLAND,
Judge
District of Alaska

APPENDIX E

[Filed Jan. 17, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A93-189 CV (HRH)

REBECCA L. PATTERSON, *et al.*,
Plaintiffs,

vs.

ANCHORAGE SCHOOL DISTRICT, *et al.*,
Defendants.

DECLARATORY JUDGMENT

THIS MATTER, having been brought before the Court upon the motion of plaintiffs REBECCA L. PATTERSON, *et al.*, for entry of Summary Judgment;[1] the cross-motion for summary judgment of defendants ANCHORAGE SCHOOL DISTRICT, ROBERT CHRISTAL and LELAND C. WILSON;[2] the motion of defendants NEA-ALASKA and ANCHORAGE EDUCATION ASSOCIATION (AEA) for summary judgment;[3] and the motion of defendant ANCHORAGE SCHOOL DISTRICT for summary judgment as to the validity of the indemnification agreement in the collective bargaining agreement between it and defendant AEA;[4] and the Court having read,

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[1] Clerk's Docket No. 81.

[2] Clerk's Docket No. 97, 106.

[3] Clerk's Docket No. 34.

[4] Clerk's Docket No. 47.

heard and considered the arguments of counsel, and having entered its Order dated June 2, 1994,[5] and its Order dated November 20, 1995,[6] and being fully advised,

IT IS HEREBY ORDERED, ADJUDGED and DECREED, and DECLARED pursuant to 28 U.S.C. § 2201, as follows:

1. That the notice sent plaintiffs on September 11, 1992, was deficient under the First Amendment to the Constitution of the United States because it included or incorporated a "local unit presumption";

2. That the notice sent plaintiffs on September 11, 1992, was insufficient under the First Amendment to the Constitution of the United States because it failed to provide for auditor verification that amounts claimed to be spent in a previous year referenced in the defendant associations' calculation of chargeable and chargeable items had been actually spent;

3. That an auditor verifying that the amounts claimed to be spent in a previous year need not determine or decide whether an item should be chargeable or non-chargeable.

4. That the deficiencies referred to in paragraphs "1" and "2" above were not rectified by a supplemental notice sent in December, 1992;

5. That the indemnification clause contained in the collective bargaining agreement between defendant Anchorage School District and the Anchorage Education Association is valid;

6. That the arbitration procedures established by defendants Anchorage Education Association and NEA-Alaska, utilizing the services of the American Arbitration Association, and including the "deduction/escrow/rebate

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[5] Clerk's Docket No. 77.

[6] Clerk's Docket No. 111.

procedure" are constitutional and lawful, and must be utilized by employees who wish to challenge the Associations' calculation of chargeable and nonchargeable items for the purpose of establishing service fees;

7. That all issues of chargeability for the 1992-93 year between plaintiffs and the Anchorage Education Association and NEA-Alaska, including issues raised by plaintiffs herein with regard to litigation expenses, organizational maintenance and lobbying (whether of the said organizations or their affiliate, the National Education Association) shall be determined by an arbitrator to be selected by the American Arbitration Association, through arbitration, and chargeability issues may not be brought to the court for determination until arbitration is completed;

8. That plaintiffs are not entitled to an advance reduction of their service fees, and the Associations' use of the deduction/escrow/refund procedure is permissible;

9. That plaintiffs do not have a valid Fifth Amendment claim;

10. That plaintiffs do not have a right to bargain for or seek appointment of a specific arbitrator, and the selection of the arbitrator by the American Arbitration Association is permissible;

11. That the Anchorage School District, as a public employer, had a duty to protect the constitutional rights of the plaintiffs by taking reasonable precautions to make certain that the notice sent to plaintiffs was sufficient and that procedures for challenging an agency fee are constitutional,

12. That the Anchorage School District, in light of the noted deficiencies in the September, 1992, notice, breached such duty;

13. The Anchorage School District be, and it is hereby, prohibited from enforcing its indemnity agreement with the Anchorage Education Association; and

14. Plaintiffs are not entitled to any relief from this Court other than a declaration of their rights, as set forth above.

DONE AT ANCHORAGE, Alaska, this 12 day of January, 1996.

/s/ H. Russel Holland
H. RUSSEL HOLLAND
United States District Judge

Supreme Court, U.S.
FILED
APR 8 1998
OFFICE OF THE CLERK

No. 97-1454

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ANCHORAGE EDUCATION ASSOCIATION, *et al.*,
Petitioners,

v.

REBECCA PATTERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENTS REBECCA PATTERSON, *ET AL.*, IN OPPOSITION TO THE PETITION

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April 8, 1998

39 pp

COUNTER-STATEMENT OF THE QUESTION PRESENTED

May a federal court require plaintiffs to exhaust their administrative remedies prior to bringing a federal civil rights action pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988)?

TABLE OF CONTENTS

Page

Counter-Statement of the Question Presented i

Table of Authorities iii

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Denying the Petition 6

I. Petitioners Mischaracterize the Issue Decided By the Lower Court, Which Addressed an Article III Court's Duty To Adjudicate Damages 6

II. The Ninth Circuit Was Faithful To This Court's Precedents, Which Unambiguously Reject Efforts To Force Civil Rights Plaintiffs To Exhaust Their Administrative Remedies 9

Conclusion 30

TABLE OF AUTHORITIES

Cases — *Page*

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 18, 25, 26, 29

Abrams v. Communications Workers, 59 F.3d 1373 (D.C. Cir. 1995) . . . . . *passim*

Air Line Pilots Association v. Miller, No. 97-428 (U.S. Nov. 26, 1996) 6, 22

Associated Plumbing & Mechanical Contractors v. Plumbers Local 447, 811 F.2d 480 (9th Cir. 1987) 24

AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643 (1986) 9

Bagnall v. ALPA, 626 F.2d 336 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981) 10

Beck v. Communications Workers, 468 F. Supp. 87 (D. Md. 1979) 21

Bethlehem Mines Corp. v. Mine Workers, 344 F. Supp. 1161 (W.D. Pa. 1972), *aff'd*, 494 F.2d 726 (3d Cir. 1974) 23-24

In re Bituminous Coal Operators' Association, 949 F.2d 1165 (D.C. Cir. 1991) 16, 19

Bromley v. Michigan Education Association, 843 F. Supp. 1147 (E.D. Mich. 1994), *rev'd*, 82 F.3d 686 (6th Cir. 1996), *cert. denied*, --- U.S. ---, 117 S. Ct. 682 (1997) . . . . . *passim*

TABLE OF AUTHORITIES (CONT.)

Cases	*Page*
Brosterhous v. State Bar, 906 P.2d 1242 (Cal. 1995)	18
Burlington N.R.R. v. Department of Revenue, 934 F.2d 1064 (9th Cir. 1991)	16
Carey v. Piphus, 435 U.S. 247 (1978)	8
City of Riverside v. Rivera, 477 U.S. 561 (1986)	11
Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986)	8, 19
Communications Workers v. Beck, 487 U.S. 735 (1988)	11, 12, 26
Cox v. New Hampshire, 312 U.S. 569 (1941)	29
Damiano v. Matish, 830 F.2d 1363 (6th Cir. 1987)	23
Edwards v. Ralisok, --- U.S. ---, 117 S. Ct. 1584 (1997)	12
Ellis v. Railway Clerks, 466 U.S. 435 (1984)	15, 29
Ellis v. Western Airlines, 652 F. Supp. 938 (S.D. Cal. 1986)	3
Farrar v. Hobby, 506 U.S. 103 (1992)	8, 19
Felder v. Casey, 487 U.S. 131 (1988)	*passim*
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)	9

TABLE OF AUTHORITIES (CONT.)

Cases	*Page*
Food & Commercial Workers Local 951 v. Mulder, 31 F.3d 365 (6th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995)	10, 16, 18
Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974)	9
Gibney v. Toledo Board of Education, 532 N.E.2d 1300 (Ohio 1988)	18
Heck v. Humphrey, 512 U.S. 477 (1994)	12
Hills v. Gautreaux, 425 U.S. 284 (1976)	8
Hohe v. Casey, 956 F.2d 399 (3d Cir. 1992)	3, 18, 27
Hudson v. Teachers Local No. 1, 922 F.2d 1306 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991)	7, 19, 20, 21
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)	29
Kimberly v. Arms, 129 U.S. 512 (1889)	16
Knight v. Kenai Peninsula Borough School District, 131 F.3d 807 (9th Cir. 1997)	18
La Buy v. Howes Leather Co., 352 U.S. 249 (1957)	19
Lancaster v. ALPA, 76 F.3d 1509 (10th Cir. 1996)	10, 18, 21
Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991)	4, 15, 25

TABLE OF AUTHORITIES (CONT.)

Cases	*Page*
Lehnert v. Ferris Faculty Association, 707 F. Supp. 1473 (W.D. Mich. 1988)	3
Lehnert v. Ferris Faculty Association, 643 F. Supp. 1306 (W.D. Mich. 1988)	11, 12
Lowary v. Lexington Local Board of Education, 903 F.2d 422 (6th Cir. 1990)	7, 19
Lucid v. City and County of San Francisco, 774 F. Supp. 1234 (N.D. Cal. 1991)	3
McCarthy v. Madigan, 503 U.S. 140 (1992)	14
McDonald v. City of West Branch, 466 U.S. 284 (1984)	15
Machinists v. Street, 367 U.S. 735 (1963)	19
Miller v. ALPA, 108 F.3d 1415 (D.C. Cir.), *cert. granted*, No. 97-428 (Nov. 26, 1997)	*passim*
Neal v. System Board of Adjustment, 348 F.2d 722 (8th Cir. 1965)	27
Pacemaker Diagnostic Clinic v. Instromedix, 725 F.2d 537 (9th Cir.) (*en banc*), *cert. denied*, 469 U.S. 824 (1984)	19
Patsy v. Florida Board of Regents, 457 US. 496 (1982)	*passim*
Pattern Makers' League v. NLRB, 473 U.S. 95 (1985)	26
Peretz v. United States, 501 U.S. 923 (1991)	8, 19

TABLE OF AUTHORITIES (CONT.)

Cases — *Page*

Poulos v. New Hampshire, 345 U.S. 395 (1953) 29

Railway Clerks v. Allen, 373 U.S. 113 (1963) 7, 26

Railway Employes' Department v. Hanson, 351 U.S. 225 (1956) 26

Reese v. City of Columbus, 71 F.3d 619 (6th Cir. 1995), *cert. denied*, --- U.S. ---, 117 S. Ct. 386 (1996) 3

Roth v. United States, 354 U.S. 476 (1957) 29

Schneider v. Colegio de Abogados, 682 F. Supp. 674 (D.P.R. 1988), *aff'd in part, rev'd in part*, 917 F.2d 620 (1st Cir. 1991) 3-4

Soto Segarra v. Sea-Land Services, Inc., 581 F.2d 291 (1st Cir. 1978) 10

Stauble v. Warrob, Inc., 977 F.2d 690 (1st Cir. 1992) 16, 18, 19

Teachers Local No. 1 v. Hudson, 475 U.S. 292 (1986) ..... *passim*

Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987), *further proceedings*, 917 F.2d 927 (6th Cir. 1990) ... 3, 17, 18

Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) 29

TABLE OF AUTHORITIES (CONT.)

Cases *Page*

In re United States,
816 F.2d 1083 (6th Cir. 1987) 16

United Transportation Union v. State Bar,
401 U.S. 576 (1971) 23

Weaver v. University of Cincinnati,
942 F.2d 1039 (6th Cir. 1991), *further proceedings* 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993) 8, 25

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 27, 28, 29

Constitutions, Statutes, and Other Rules

U.S. Const. art. III . . . . . *passim*

U.S. Const. amend. I . . . . . *passim*

U.S. Const. amend. XIV 2-3

28 U.S.C. § 1331 16

28 U.S.C. § 1337(a) 16

Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988) . . . *passim*

Railway Labor Act, 45 U.S.C. § 151, *et seq.* 21, 26

Supreme Court Rule 15 1

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97-1454

ANCHORAGE EDUCATION ASSOCIATION
and NEA-ALASKA, INC.,

Petitioners,

v.

REBECCA L. PATTERSON, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15, Respondents Rebecca L. Patterson, *et alia* ("the teachers"), oppose the Petition of the Anchorage Education Association ("AEA") and NEA-Alaska, Inc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Besides the provisions set out in the Petition ("Pet.") at 2, this case raises issues under Article III of the Constitution of the United States. Article III provides in pertinent part:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such

> such inferior Courts as the Congress may from time to time ordain and establish....
>
> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States....

This case also raises issues under the Fourteenth Amendment to the Constitution of the United States. It provides in pertinent part:

> **Section 1.** .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents Rebecca L. Patterson, *et al.*, initiated this civil rights class action against their monopoly bargaining representative, its state-wide affiliate (collectively, "the unions"), and their public employer and certain officials thereof, to vindicate their First- and Fourteenth-Amendment rights.

The teachers' complaint alleged that the efforts of the unions and the Anchorage School District ("ASD") to enforce their "agency shop" arrangement violated their constitutional rights, because the unions and/or ASD failed to comply with "the constitutional requirements for the ... collection of agency fees," as set forth in *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

As relief, the teachers sought restitution of all fees collected or a declaration that those teachers who had refused to pay any fees owed no financial obligation to the unions.

On cross-motions for summary judgment, the district court found that the unions failed to comply with *Hudson*, Appendix

("App.") B at 27a-29a, App. C at 39a-40a and App. E at 60a, and ordered entry of some relief requested by the teachers.[1] It is notable, however, that **not** among the violations alleged was a requirement that the nonmembers exhaust the unions' "impartial decisionmaker" procedure before challenging their fee calculation in federal court. No such requirement was stated or suggested anywhere in Petitioners' notice and procedures.

The district court rejected the teachers' argument that a union notice claiming that constitutionally nonchargeable categories of expenditures are, in fact, chargeable is constitutionally deficient under *Hudson*,[2] and also rejected the teachers'

---

[1] Protestations to the contrary notwithstanding, and though correctly conceding that "they are not at issue here," the unions clearly do **not** "accept[ ] the district court's rulings on" the district court's findings that their notice and procedures were constitutionally inadequate, and superfluously expend more than one-third of a page arguing why the district court erred in its findings on this irrelevant issue. Pet. at 4-5, n.4.

[2] *But see Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995), *cert. denied*, — U.S. —, 117 S. Ct. 386 (1996) (deciding issues in challenge to adequacy of union's notice and procedures); *see also Abrams v. Communications Workers*, 59 F.3d 1373, 1380 (D.C. Cir. 1995); *Hohe v. Casey*, 956 F.2d 399, 414, n.8 (3d Cir. 1992); *Tierney v. City of Toledo*, 824 F.2d 1497, 1505-06 (6th Cir. 1987) (procedures for collecting agency-shop fees are "constitutionally deficient under *Hudson*" because the union's "formulation" of the costs that are chargeable was **substantively** erroneous); *Schneider v. Colegio de Abogados*, 917 F.2d 620, 631 (1st Cir. 1991); *Lucid v. City and County of San Francisco*, 774 F. Supp. 1234, 1238 (N.D. Cal. 1991); *Ellis v. Western Airlines*, 652 F. Supp. 938, 940 (S.D. Cal. 1986); *Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1473, 1481-82 (W.D. Mich. 1988) ("the standard for calculating the fee [under a union's collection procedure] must properly define chargeable costs for it to pass constitutional muster under *Hudson*"); *cf. Schneider v. Colegio de Abogados*, 682 F. Supp. 674, 686-87 (D.P.R. 1988), *aff'd in pertinent part*, 917 F.2d at 631 (considering the (continued...)

request for damages, holding that they were not entitled to restitution of all fees collected and/or a declaration that they owed no financial obligation to the unions. App. D at 45a-46a. The district court held that, notwithstanding the unions' failure to comply with "the constitutional requirements for the ... collection of agency fees," *Hudson*, 475 U.S. at 310, they were still entitled to collect some portion of the fees demanded of the teachers.[3]

Rather than adjudicate the appropriate amount of that fee, the district court determined that "the appropriate remedy for this case at this time is to order arbitration." App. C at 46a. The district court entered judgment that the unions' "arbitration" procedures

> must be utilized by employees who wish to challenge the Associations' calculation of chargeable and nonchargeable

---

[2] (...continued)
constitutionality under *Hudson* of a rule establishing procedures for the collection of mandatory bar dues; holding that "[p]erhaps the most basic flaw in this arrangement lies in the rule's definition of 'objectionable activities'").

[3] Typical of the self-serving extra-record claims characteristic of their Petition, the unions state that such fees are demanded for AEA affiliates "to pay **for services provided** by NEA-Alaska; and ... to pay **for services provided** by [the National Education Association]." Pet. at 3 (emphasis added). Of course, the last time an NEA-affiliate was before this Court on agency-shop issues, the unions fiercely maintained, and this Court held, that bargaining activities of state and national affiliates were chargeable "even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991). If Petitioners now concede for purposes of the remainder of this litigation that its position as stated to this Court is appropriate and controlling, the teachers will accept it. However, Petitioners' narrow characterization here of their practices does not reflect their actual practices.

> items for the purpose of establishing service fees, [and] [t]hat all issues of chargeability ... including issues raised by plaintiffs herein with regard to litigation expenses, organizational maintenance and lobbying ... shall be determined by an arbitrator to be selected by the American Arbitration Association ["AAA"], through arbitration, and chargeability issues may not be brought to the court for determination until arbitration is completed.

Id. at 60a-61a.

The teachers' appealed to the Ninth Circuit raising, *inter alia*, two issues relevant to the Petition:

* * * *

> 2. Whether the District Court properly denied full restitution and/or relief from the obligation to pay fees to the teachers for violations of their constitutional rights.
>
> 3. Whether the District Court properly designated a nonconsensual, non-Article III judge to adjudicate the teachers' damages, instead concluding that "the arbitration procedures established by [the unions], utilizing the services of the American Arbitration Association ... must be utilized by employees who wish to challenge the Association's calculation of chargeable and nonchargeable items for the purpose of establishing service fees.

Plaintiffs-Appellants/Cross-Appellees' Brief at 3.

The Ninth Circuit reversed the district court's ruling on both questions. First, for the year at issue, "the amount of the agency fee ... lawfully ... chargeable to them" is **zero**,"[b]ecause ... AEA failed to satisfy *Hudson*'s requirements and was not entitled to the fees that it collected"; "Patterson is ... entitled to relief." *Id.* Petitioners have not sought review of this determination.[4]

---

[4] Petitioners seriously mischaracterize the nature of the relief (continued...)

As to whether "other relief had to be arbitrated," *id.* at 16a, specifically, the district court's holding that "Patterson had to arbitrate her damages," *id.* at 15a, the Ninth Circuit held that "nonmembers are not required to exhaust union remedies to which they did not agree before challenging the chargeability determinations in federal court." *Id.* at 18a.

REASONS FOR DENYING THE PETITION

Petitioners state that this case presents the same question pending before this Court in *Air Line Pilots Association v. Miller*, No. 97-428 (U.S. Nov. 26, 1997). Pet. at 5. However, substantial differences exist between the cases, and the Ninth Circuit reached a correct conclusion of law required by this Court's jurisprudence. Therefore, the writ should be denied.

I. Petitioners Mischaracterize the Issue Decided By the Lower Court, Which Addressed an Article III Court's Duty To Adjudicate Damages.

This case is not about a nonmember teacher's obligation to exhaust the unions' impartial decisionmaker process. This case is about a court's effort to refer damages calculations to a non-Article III decisionmaker. When this case is viewed in its proper light, then, much of the unions' discussion is rendered decidedly off-topic.

---

[4] (...continued)
sought by the teachers, Pet. at 3-5, asserting that "Respondents ... sought to have the district court determine the amount of the agency fee that lawfully was chargeable to them." *Id.* at 3. However, the teachers invoked their right to a federal adjudication of the appropriately chargeable fee calculation only **in lieu of** restitution of fees collected and/or a declaration that the unions were entitled to nothing, owing to the unions' failure to satisfy *Hudson*'s requirements, if the district court adopted the unions' argument and/or declined to order full restitution.

Petitioners err by relegating the core of the Ninth Circuit's decision to footnote status, Pet. at 11 n.9, stating merely that "there is language in the Ninth Circuit's opinion suggesting that what the district court required here was arbitration of respondents' 'damages.'" Such language appears in the Ninth Circuit's decision for very good reason—that is precisely what the district court ordered. App. C at 44a-45a.

Importantly, it did so at **the unions'** urging. They argued below that, in lieu of restitution of all fees demanded and/or collected in the absence of complete compliance with "the constitutional requirements for the ... collection of agency fees," *Hudson*, 475 U.S. at 310, the district court should award "only the nonchargeable portion of the fee." App. C at 45a. The district court's decision was based upon the teachers' request for "a full refund of the escrowed fees," and "[i]n the event that a full refund is not granted, [the teachers] request that this court determine the amount of a refund, rather than assign such a decision to the arbitrator." *Id.*, *citing Railway Clerks v. Allen*, 373 U.S. 113, 119-20 (1963); *Hudson v. Teachers Local No. 1*, 922 F.2d 1306, 1313-15 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991); *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 433-34 (6th Cir. 1990). However, having determined that the teachers were entitled to less than a full refund, the district court abdicated its judicial responsibility and sought to force the teachers to "arbitrate" their damages before the unions' "impartial decisionmaker."

Apparently cognizant of their peril, and desperate to receive dispensation for a "union exception" to normal principles of law, the unions here ignore the actual substance of the decisions below, instead attempting to place the square peg of this case in the round hole of *Miller v. ALPA*, 108 F.3d 1415 (D.C. Cir.), *cert. granted*, No. 97-428 (Nov. 26, 1997), arguing that it is an exhaustion case. Pet. at 5. This characterization is inaccurate.

Nowhere in Petitioners' constitutionally-deficient notice and procedure was an "exhaustion" requirement purported to be imposed. Further, to do so now would impose upon the teach-

ers, as a foregone conclusion, the results of a proceeding in which they did not participate. They had **no legitimate reason** to suspect that those results would be imposed upon them. *But see, Weaver v. University of Cincinnati*, 970 F.2d 1523, 1534-36 (6th Cir.1992), *cert. denied*, 507 U.S. 917 (1993). It is difficult to imagine a more stunning and thorough-going denial of due process.

Moreover, this Court repeatedly has reaffirmed the proposition that the finding of a constitutional violation "impose[s] a duty **on the District Court** to grant appropriate relief," *Hills v. Gautreaux*, 425 U.S. 284, 297 (1976) (emphasis added), since Article III, § 1, "preserves to litigants their interest in an impartial and independent **federal adjudication** of claims within the judicial power of the United States." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (emphasis added); *see also Peretz v. United States*, 501 U.S. 923, 936 (1991) (litigants have "personal right to have an Article III judge preside over a civil trial"); *cf. Farrar v. Hobby*, 506 U.S. 103 (1992); *see also Hudson*, 475 U.S. at 309 n.22 ("The judicial remedy for a proven violation of the law will often include commands the law does not impose on the community at large").[5]

When viewed in the proper light, then, the Ninth Circuit's decision is well within the mainstream of the jurisprudence of both this Court, and of the lower federal courts. No cogent reason is present for granting the writ.

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[5] "[W]hen a plaintiff establishes the violation of [his] right to procedural due process," a court is "obligate[d]" under 42 U.S.C. §1983 "to award nominal damages." *Farrar*, 506 U.S. at 112, *citing Carey v. Piphus*, 435 U.S. 247, 266 (1978). No such award was made by the district court here, obviously because the district court contemplated that a damages award—the nonchargeable portion of the fee—would be adjudicated pursuant to the unions' "arbitration."

In sum, on the actual substance of the decision below, Petitioners make no case for a writ of *certiorari*.

II. The Ninth Circuit Was Faithful To This Court's Precedents, Which Unambiguously Reject Efforts To Force Civil Rights Plaintiffs To Exhaust Their Administrative Remedies.

The Petition narrowly focuses upon decisions issued in the wake of this Court's decision in *Hudson*, 475 U.S. at 301-10, as though there were some sort of "union exception" to normal principles applicable to constitutional claims raised pursuant to 42 U.S.C. § 1983. This Court's decisionmaking does not justify such a distinction. Moreover, the Petition constitutes a naked effort to establish labor unions as a preferred class of litigants granted authority to delay unilaterally and, therefore, deny relief sought by the victims of their constitutional torts.

In light of *Hudson*'s determination, the proposition that the teachers need not exhaust the unions' "impartial decisionmaker" procedure before they may challenge the unions' agency fee in court is not a matter of controversy among the circuits. Therefore, a writ of *certiorari* is inappropriate here.

A. It is a black-letter rule of law that a party can be required to arbitrate a dispute only where there is a contract or other voluntary agreement to do so, or some statutory mandate. *E.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974); *Abrams*, 59 F.3d at 1382 & n.14. The unions concede that the teachers did not contract for, or otherwise agree to, arbitration of their agency-fee dispute.[6]

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[6] For this reason, the unions' characterization of their "impartial (continued...)

Moreover, the teachers are not union members. App. A at 4a. As such, they are "not bound by contract with the union to exhaust any formal internal union appeals before resorting to a judicial forum." *Soto Segarra v. Sea-Land Services, Inc.*, 581 F.2d 291, 295 (1st Cir. 1978); *see Bagnall v. ALPA*, 626 F.2d 336, 341 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).[7]

Neither statutory mandate nor voluntary agreement compels exhaustion of administrative remedies. To the contrary, the governing statute, 42 U.S.C. § 1983, precludes imposition of an exhaustion requirement. *See* § I(B), *infra*.

Petitioners concede as much by devoting the bulk of their argument, Pet. at 6-15, to policy arguments why exhaustion should be required.

In large part, Petitioners rely upon their extra-record claims that the virtue of their so-called "arbitration" process is that it "certainly is more 'expedi[tious]' than the judicial process." Pet. at 8-9 & nn. 6 & 9. They neglect to mention that among the reasons why it is so much more "expeditious" are: (1) that teachers testing union chargeability claims typically are denied discovery as a matter of right—typically denied by AAA arbitrators, *see, e.g.*, *Miller*, 108 F.3d at 1417; *Bromley v. Michigan Education Association*, 843 F. Supp. 1147, 1153 (E.D. Mich. 1994), *rev'd*, 82 F.3d 686 (6th Cir. 1996), *cert. denied*, ---

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[6] (...continued)
decisionmaker" process as "arbitration" approaches a fraud upon the Court. While its compliance with *Hudson*'s requirements is not challenged, Pet. at 4 n.2, conceding that point does not establish that the procedure is "arbitration," as that concept normally is understood. Arbitration it is **not**.

[7] AEA's negotiated collective bargaining agreement could not require the **teachers** to arbitrate their disputes with **itself**, as opposed to disputes with their employer. *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 368-69 (6th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *Bagnall*, 626 F.2d at 342; *but see Lancaster v. ALPA*, 76 F.3d 1509, 1524-26 (10th Cir. 1996).

U.S. ---, 117 S. Ct. 682 (1997)—available to them only in the federal courts, and necessary to a full and fair adjudication; (2) it is **union** resistance to reasonable discovery requests and to the litigation as a whole that prevents it from being "expeditious." *See Bromley* (litigation first filed in 1992 is still pending); *cf. City of Riverside v. Rivera*, 477 U.S. 561, 580 n.11 (1986) ("Those who elect a militant defense ... must take into account the time and effort they extract from their opponents. It is ... [defendants'] right to contest every aspect of this claim, but they cannot now disclaim the consequences of their actions").[8]

---

[8] Petitioners likewise would have this Court conclude, Pet. at 10, *inter alia*, that the undocumented lack of challenges to the results of their so-called "arbitration" process occurs because "objectors often ... find that the arbitrator's decision satisfactorily resolves their objections." Pet. at 10 (citing the self-serving characterization of "the experience of AEA's parent organizations"). Of course, it is equally likely that such individuals acquiesce when union fee calculations are rubberstamped by AAA "arbitrators," as contrasted with the substantial reductions achieved when such questions are litigated before the federal courts, *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1334 (W.D. Mich. 1986) (determining after trial that less than 14% of union expenditures were properly chargeable, after an initial union claim that a multiple of that percentage was chargeable); *see also Communications Workers v. Beck*, 487 U.S. 735, 740 (1988), because they lack the resources to bring and maintain complex litigation in the federal courts.

Indeed, the only rational conclusion—given the litigation record of Petitioners' national affiliates and their efforts in this case—is that Petitioners' goal is to guarantee that **no meaningful review** of their chargability claims **ever occur**. This is evident from Petitioners' insistence on characterizing their "impartial decisionmaker" process as "arbitration," thus providing the basis to argue a lesser standard of review. *Bromley*, 843 F. Supp. at 1154, 1156 (giving "great deference to the fact-findings made by the arbitrator"). While Petitioners' desire to first "wear out" challengers, and then to deny meaningful review for those who persist in their challenges by bringing them to court, is understandable in light of the litigation record

(continued...)

The Ninth Circuit was thus correct in its observation that an exhaustion requirement frustrates the teachers' right to a full, fair, **and most importantly, reliable** adjudication of their claims. App. A at 18a. Petitioners' suggestion that such litigation cannot be "expeditious" is akin to the defendant convicted of patricide, who begs for mercy because he is an orphan.

Nevetheless, it is unnecessary here to rebut in detail Petitioners' self-serving characterizations of the purpose of *Hudson*'s prophylactic requirements and their unjustified conclusions regarding nonmembers and *Hudson*-type litigation, for it is noteworthy that Petitioners gloss over the statutory and constitutional context in which this case arises.

B. The proposition that exhaustion of administrative (or internal union) remedies can or should be required in suits pursuant to 42 U.S.C. § 1983 was unanimously rejected by this Court as recently as last term. *Edwards v. Ralisok*, --- U.S. ---, 117 S. Ct. 1584, 1589 (1997) ("a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed"); *see also Heck v. Humphrey*, 512 U.S. 477, 481 (1994) (§ 1983 contains no judicially imposed exhaustion requirement). However, these most recent statements hardly were the first time that this Court had occasion to consider this issue, or resoundingly to reject an argument that exhaustion should be required. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 500-01 (1982) ("this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983"), *and cases cited therein*; *Felder v. Casey*, 487 U.S. 131 (1988).

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[8] (...continued)
of such challenges, *see Lehnert*, 643 F. Supp. at 1334 (reducing chargeable fee to fraction of that initially claimed); *Beck*, 487 U.S. at 740 (same), such self-serving union goals are hardly consonant with Petitioners' duties under the First Amendment and *Hudson*, 475 U.S. at 307 n.20.

Petitioners attempt to avoid *Patsy*'s unambiguous mandate by arguing that *Hudson*'s "impartial decisionmaker" "is not a state administrative remedy; it is a procedure created and governed by federal law, and it is administered by a union, not by state authorities." Pet. at 13. This is a distinction without a difference. In negotiating and enforcing its forced-unionism agreement, a union acts "under color of" state law. *See Felder*, 487 U.S. at 139 ("Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those **wielding** state authority") (emphasis added). Nevertheless, we suppose Petitioners fatuously suggest that a process established by unions pursuing their own economic interests are somehow due more deference than state administrative remedies.

Under remarkably similar circumstances, this Court has observed:

> We think it plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries.

Felder, 487 U.S. at 142. There, it was argued that, only for § 1983 actions brought in state courts, civil rights plaintiffs should be required to satisfy Wisconsin's "notice-of-claim" statute. *Id.* at 135-36. This Court reversed the Wisconsin Supreme Court's ruling sustaining the requirement, rejecting numerous arguments asserting "sound notions of public administration" because they "necessarily clash with the remedial purposes of the federal civil rights laws." *Id.* at 145. This Court further noted that:

> The decision to subject state subdivisions to liability for violations of federal rights, however, was a choice that Congress ... made, and it is a decision that the State has no authority to override. Thus, ... the State's interest ... is patently incompatible with the compensatory goals of the federal legislation....

Id. at 143. It seems self-evident that a procedure established by a labor union as a precondition to pursuing its own economic interests, *Hudson*, 475 U.S. at 310 ("the constitutional requirements for the ... **collection** of agency fees") (emphasis added), is entitled to even less regard than a state scheme to which can be attributed at least the façade of "understandable or laudable ... State[] interest." *Felder*, 487 U.S. at 143.

Aside from this practical consideration, *Patsy*'s bar on exhaustion requirements is equally applicable to state and federal remedies. *Compare McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *with Patsy*, 457 U.S. at 501-02 & n.4. Petitioners proceed from an assumption unambiguously rejected by this Court in their assertion that "[b]ecause Congress has not clearly spoken on the matter, the question whether 'exhaustion of remedies' should be required in this context must be determined by this Court in accordance with 'sound judicial discretion.'" Pet. at 13, *citing McCarthy*, 503 U.S. at 144. Under § 1983, Congress has "clearly spoken," reaffirming "**categorically** that exhaustion is not a pre-requisite to an action under § 1983," policy considerations notwithstanding, and this Court has so held. *Patsy*, 457 U.S. at 500-01, 512-16 (emphasis added); *see Felder*, 487 U.S. at 146-50.

C. Petitioners maintain that whether a court should require exhaustion of an internal union process is an open, contentious issue in this context, because *Hudson*:

> did not expressly address the question presented here ..., the Court's statement that funds must be escrowed while challenges are pending "*before [the] impartial decisionmaker*" appears to contemplate that all objections will be presented to that decisionmaker; indeed, the Court did not describe any other mechanism for terminating the escrow of an objectors's funds.

Pet. at 7-8 (original emphasis).

To the contrary, in holding that the union's procedure in *Hudson* was constitutionally "inadequate because the [arbitra-

tor's] selection represents the Union's unrestricted choice," this Court noted that, even if both parties selected the arbitrator, "[t]he arbitrator's decision would not receive preclusive effect in any subsequent [42 U.S.C.] § 1983 [(1988)] action. *See McDonald v. [City of] West Branch*, 466 U.S. 284 (1984)." 475 U.S. at 308 & n.21. The Court was aware of Justice White's suggestion that "if the union provides for arbitration ... it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts," but chose not to accede to it. *Compare id.* at 311 (concurring opinion) *with id.* at 308-09 (opinion of the Court).[9] The Court's action clearly implies that, if the union alone opts for arbitration, that procedure cannot be required of nonunion employees.

As *Hudson* recognized by citing *McDonald*, compelled arbitration never can be appropriate, because arbitration cannot provide "an adequate substitute for a judicial proceeding in protecting ... federal statutory and constitutional rights." *McDonald*, 466 U.S. at 290. Even if the Ninth Circuit had not held that the teachers owe nothing to the unions owing to their failure to comply with *Hudson*, App. A at 16a, the teachers' claim that some of Petitioners' expenditures of their agency fees were not "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative" raises issues under the First Amendment to the United States Constitution. *See Lehnert*, 500 U.S. at 522; *Ellis v. Railway Clerks*, 466 U.S. 435, 445-48, 455-56 (1984).

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[9] Even so, Justice White's concurrence lends no support to Petitioners. His suggestion that a union "should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts," *Hudson*, 475 U.S. at 311, was premised upon the union's "compli[ance] with the other requirements specified in our opinion." This is a condition unmet by Petitioners here; they were adjudicated to have failed to comply with "the other requirements specified in [the Ninth Circuit's] opinion." App. A at 16a.

The district courts Congress created under Article III of the Constitution "have original jurisdiction of all civil actions arising under the Constitution [or] laws ... of the United States." 28 U.S.C. §§ 1331, 1337(a). Neither the First Amendment, nor the Civil Rights Act of 1871, nor any other statute authorizes this Court to prefer a class of litigants by delegating this jurisdiction to non-Article III decisionmakers independent of constitutional norms—union-approved "arbitrators" in agency-fee cases. Under Article III, to do so would be for the court to "abdicate its duty to determine by its own judgment the controversy presented...." *Kimberly v. Arms*, 129 U.S. 512, 514 (1889).

Therefore, Article III and the **Judicial Code** prohibit federal courts from deferring, on issues of law or fact, to "non-statutory arbitration conducted by a privately appointed decisionmaker" in agency-fee cases. *Bromley*, 82 F.3d at 692 (§ 1983 case); *cf. Stauble v. Warrob, Inc.*, 977 F.2d 690, 696-98 (1st Cir. 1992) ("nonconsensual reference of fundamental issues of liability ... for adjudication is not consonant with ... Article III"); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1169 (D.C. Cir. 1991) (opinion by R. Ginsburg, J.) (same, in *mandamus* action); *Burlington N.R.R. v. Department of Revenue*, 934 F.2d 1064, 1073 (9th Cir. 1991) (same); *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987) (same).

Clearly, if federal courts should not defer to a federal agency in agency-fee cases arising under the duty of fair representation, *Mulder*, 31 F.3d at 368-69, they should not defer to a private "arbitration" set up by the very union alleged to have violated nonmembers' constitutional rights. Indeed, a "procedure requiring an objector who challenges [an agency fee] to exhaust Union-provided arbitration violates [the] duty of fair representation by limiting the choice of forum for the challenge." *Abrams*, 59 F.3d at 1382.

Hudson did not suggest that "an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice," 475 U.S. at

308 n.21, to oust the courts of jurisdiction in cases in which unions adopt an arbitration scheme. It merely "reject[ed] the Union's suggestion that the availability of ordinary judicial remedies is sufficient" to meet the union's special, independent responsibility itself "to provide procedures that ... facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n.20.

That is, to render an agency-shop arrangement arguably constitutional at all, a union must affirmatively establish a procedure for an expeditious decision by an "impartial decision-maker." But the Court clearly countenanced no notion that the union could compel nonunion employees to resort to such a procedure before seeking judicial relief.

To the contrary, *Hudson* "presume[d] that the courts remain available as the ultimate protectors of constitutional rights." *Id.* at 307 n.20. Creation of a scheme for an "impartial decision-maker" is thus a special duty *Hudson* imposed on unions solely to "**facilitate** a nonunion employee's ability to protect his rights," *id.* (emphasis added), if the employee chooses to avail himself of it. It is not a grant to unions of new powers over such employees. If nonunion employees believe, as the teachers do, that such a scheme does not facilitate, but rather impedes, their rights—and that it is, in fact if not in law, far from "impartial"—they remain free to seek "ordinary judicial remedies," *id.* *See Tierney v. City of Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990) (a requirement that nonunion employees exhaust arbitration before seeking judicial relief "unduly implies a limitation upon the [nonmembers'] constitutional rights"). To require otherwise converts the employees' shield under *Hudson* into a sword by which unions may separate employees from their right of access to the federal courts.

D. Even in the overly-narrow context in which Petitioners pigeon-hole this case, and contrary to the panel's and Petitioners' error ("'courts are divided on the issue' of 'whether nonmembers can be forced to arbitrate a union's chargeability determinations before seeking relief in federal court,'" Pet. at 6,

citing App. A at 16a), every court agrees with the Ninth Circuit that *Hudson* does not require exhaustion of agency-fee arbitration procedures. *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 816 (9th Cir. 1997), App. A at 18a; *see also Bromley*, 82 F.3d at 694; *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992); *Tierney*, 917 F.2d at 939-40; *Gibney v. Toledo Bd. of Educ.*, 532 N.E.2d 1300, 1303-05 (Ohio 1988); *cf. Abrams*, 59 F.3d at 1382 (under National Labor Relations Act); *Mulder*, 31 F.3d at 367-68 (same); *see also Brosterhous v. State Bar*, 906 P.2d 1242, 1251, 1255-58 (Cal. 1995) (no exhaustion required of attorneys challenging the amount of compulsory bar dues).

Only one court, under the Railway Labor Act, has reached a contrary conclusion. *Lancaster*, 76 F.3d at 1521-22. And in so doing, it seriously misreads this Court's decision in *Hudson*.[10]

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[10] The Tenth Circuit characterized it as "persuasive" *dicta* consistent with the majority's opinion, notwithstanding Justice White's self-conscious recognition that his concurrence (joined by Chief Justice Burger) was contrary to the majority's decision. The court also relied on the argument that absent exhaustion, "the procedure spawned by the Supreme Court [in *Hudson* would be] largely a waste of time and money," *citing* in *Bromley*, 843 F. Supp. at 1153, a decision later reversed by the Sixth Circuit. 82 F.2d at 693-94. Finally, like other courts, the district court disclaimed interest in or obligation to "micromanage the fee calculation." 76 F.3d at 1522; *cf.*, *Stauble v. Warrob*, 977 F.2d at 695 (rejecting an argument of "complexity" as "the same old whine in a different bottle"). We respectfully submit, however, that permitting the agency shop notwithstanding its inherent "impact upon ... First Amendment interests," *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977), obliges the federal courts scrupulously and without reticence to insure that nonmembers are not required to subsidize activities beyond those satisfying the "compelling state interest" which caused this Court to permit public employers to impose such an obligation. Having said that a line can be drawn, it is the solemn duty of the courts to draw that line. If courts are unwilling or unable to address such

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E. Where the circuits have conflicted is not as to "'whether nonmembers can be forced to arbitrate a union's chargeability determinations before seeking relief in federal court,'" Pet. at 6, *quoting* App. A at 16a, but rather, as to whether courts may refer, without the consent of the litigants, damage calculations in a civil rights action brought pursuant to § 1983 to non-Article III decisionmakers. *Hudson*, 922 F.2d at 1314; *Lowary*, 903 F.2d at 433.

These errant cases represent a distinct departure from this Court's jurisprudence regarding the responsibilities of an Article III court, *Schor*, 478 U.S. at 850; *see also Peretz*, 501 U.S. at 936 (litigants have "personal right to have an Article III judge preside over a civil trial"); *cf. Farrar v. Hobby*, 506 U.S. 103 (1992), constituting a distinct minority among the circuits applying this Court's decisions. *Pacemaker Diagnostic Clinic v. Instromedix*, 725 F.2d 537, 541 (9th Cir.) (*en banc*, opinion by Kennedy, J.) (citations omitted), *cert. denied*, 469 U.S. 824 (1984) ("federal litigant has a personal right ... to demand Article III adjudication of a civil suit"); *see also Stauble v. Warrob*, 977 F.2d at 694 (nonconsensual reference of liability issue to non-Article III adjudicator is constitutionally prohibited); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d at 1168 (judge "**has no discretion** to impose on parties against their will 'a surrogate judge'") (emphasis added), *citing La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (party has a right to "trial before the court on basic issues involved in the litigation").

Hudson did **not** involve **any** question of nonunion employees being compelled to arbitrate a dispute over the amount of an agency fee. At issue was only the adequacy of the union's **notice** of its so-called "fair-share fee," not "the issue of the

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[10] (...continued)

constitutional issues, then the problem should be resolved at its root, by striking down the public-sector agency shop, rather than by abdication of judicial responsibility. *Cf. Machinists v. Street*, 367 U.S. 740, 795-96 (1963) (Black, J., dissenting).

accuracy of the fee itself." *See* 922 F.2d at 1309. Indeed, in the district court, the nonunion employees in *Hudson* settled part of the case by agreeing to a stipulated judgment that gave them an option to challenge the amount of the fee in the union's internal arbitration procedure. *Id.* at 1311.

On appeal, the court of appeals clearly stated the limited nature of the issue in *Hudson*. Quoting this Court's holding in *Hudson* that "the constitutional requirements for the [union's] collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending," the court of appeals explained that "[t]he [nonunion employees'] attack focuses on the **first** requirement: an adequate explanation of the basis for the fee." *Id.* at 1313 (emphasis added) (quoting *Hudson*, 475 U.S. at 310). And the question the court actually decided was "whether the **notice** gives the nonunion [employees] enough information to challenge the basis for the fee," and "sufficient information to enable the [employees] 'to decide whether there is any reason to mount a challenge'." *Id.* at 1314, 1316 (emphasis added).

So *Hudson* is no precedent for Petitioners' claim. As the Sixth Circuit concluded in *Bromley*, *Hudson* "did not hold that exhaustion of the arbitral remedy could be required as a condition to the bringing of a § 1983 action." 82 F.3d at 694. Moreover, **if** *Hudson* had held that exhaustion was required, it would have contradicted this Court's "categorical[ ]" holding that "exhaustion is not a prerequisite to an action under § 1983." *Patsy*, 457 U.S. at 500-01; *see Felder*, 487 U.S. at 146-50.[11]

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[11] It is hard to believe that, having been told by this Court in *Hudson* that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action," 475 U.S. at 308 n.21, the lower courts on remand would cavalierly disregard that admonition, ignore *Patsy* and *Felder*, and require the nonunion employees to exhaust arbitration.

Although a bare precedent, *Lancaster* is highly unconvincing. First, *Lancaster* wrongly interpreted *Hudson* as having "held [that] a dissenting employee must exhaust all available nonjudicial remedies." It then "conclude[d that] the . . . holding in *Hudson* was correct" and "adopt[ed] it as the law of th[e Tenth] Circuit." 76 F.3d at 1521-22. Thus, *Lancaster* not only stands on a misreading of *Hudson*, but also defies this Court's decisions in *Patsy* and *Felder*.[12]

Second, *Lancaster* allowed the nonunion employee there to pursue his suit, though he had not exhausted the union's arbitration, because—like here—the union had earlier failed to provide a *Hudson* notice containing sufficient information about the nature of certain allegedly chargeable assessments. 76 F.3d at 1525-27. Thus *Lancaster* itself supports the conclusion that any case, such as this,[13] in which nonunion employees prove a defective notice (in addition to claims that an agency fee is unlawfully calculated) can properly begin in federal court. But why exhaustion of a union's arbitration scheme should come into play **after** a federal court has already asserted jurisdiction is not easy to imagine. *Cf. Beck v. Communications Workers*, 468 F. Supp. 87, 91 (D. Md. 1979) ("a stay pending exhaustion of the union rebate procedure would not be helpful in promoting the ultimate resolution of the controversy," because it "is extremely unlikely that exhaustion will substantially alter the positions of the parties").

Moreover, such a proceeding would meet a need for adjudication obviated here by the Ninth Circuit's express

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[12] It also is distinguishable because the case was brought pursuant to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

[13] The teachers obtained a judgment that "the explanation provided to the nonmembers, along with the supplemental mailing, was deficient." App. A at 16a. Thus, even under *Lancaster*, exhaustion was not required here.

determination that the unions were "not entitled to the fees it collected." App. A at 16a.

Further, Petitioners overstate the case by claiming that "the Ninth Circuit acknowledged that this case presents the same issue as is pending before this Court in *Miller*." Pet. at 6. To the contrary, the panel merely agreed with the D.C. Circuit's conclusion that nonmembers cannot be forced to participate in an internal union process to adjudicate their constitutional claims.

This is highlighted by the distinctly different factual context in which this case arose, one in which the district court declined to adjudicate damages and that calculation to adjudication pursuant to Petitioners' nonconsensual, internal process. App. C at 46a; App. D at 60a-61a.

F. Even if *Hudson* could be read to have left debatable whether nonunion employees can be compelled to use an "arbitration" in which "the arbitrator's selection did not represent the Union's unrestricted choice," 475 U.S. at 308 n.21, (which the teachers deny), the record here is not suited for resolution of that issue. *Hudson* expressed deep concern with a union's unilateral selection of an "arbitrator," finding such a scheme unconstitutional under the First Amendment "because the selection represents the Union's unrestricted choice from the state list." 475 U.S. at 308.

In *Hudson*, "the Union President . . . select[ed] an arbitrator from a list maintained by the Illinois Board of Education." *Id.* at 296. Here, the unions have selected the AAA as its intermediary. Under its procedure, **at the union's request**, the AAA appoints an arbitrator in accordance with its rules. App. E at 61a.

This is a procedural distinction without a practical difference. In both cases, the union selected **the list** from which **someone other than the nonunion employees** chose the "arbitrator." As one court of appeals observed, "It may well be ... that the arbitrators chosen by the AAA from a group 'experi-

enced in labor matters' would not be perceived as typically sympathetic to [the teachers] (or their counsel)." *Miller*, 108 F.3d at 1421. It strains credulity to the breaking point to believe that Petitioners employ the AAA's "special panel of arbitrators experienced in employment relations" for a reason other than that it considers those individuals friendly to its position, and that the AAA's participation constitutes the **minimum** necessary to comply with that aspect of *Hudson*'s mandate.

In any event, however, the record does not show whether in practice Petitioners' scheme amounts to "the Union's unrestricted choice," because of the attitudes of the "special panel of arbitrators," or somehow might be deemed as fair as a mutual choice of the arbitrator by both Petitioners and the teachers. The record also does not show how the special panel is selected or what say, if any, unions have in that selection.

Thus, any attempt to resolve this issue now would entangle this Court in a purely hypothetical case.[14] The teachers submit that, as a matter of First-Amendment law, a court can impose no arbitration on nonunion employees in an agency-fee dispute; but, if arbitration can be required, it surely must provide for **mutual** selection of the actual arbitrator by the union **and the nonunion employees**, not simply by the union through the union's self-servingly selected surrogate. "By definition, an arbitrator must be a person chosen by mutual agreement." The "essential

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[14] Some courts have held that the AAA's procedure satisfies *Hudson*'s requirement for an "impartial decisionmaker." *E.g., Damiano v. Matish*, 830 F.2d 1363, 1372 (6th Cir. 1987). These opinions, though, dealt only with the situation in which nonunion employees might **voluntarily** use such a scheme. The AAA's procedure might arguably comport with *Hudson*, but only because nonunion employees could still bring their claims to court. To the extent that Petitioners might argue that these cases support **compelled** arbitration, they are neither binding nor persuasive—because in this case there is no record as to whether the AAA's procedure is, in fact, as fair as mutual selection of the arbitrator. *See United Transportation Union v. State Bar*, 401 U.S. 576, 583 (1971).

element of arbitration" is "that the selection of the particular arbitrator or the method of selection of an arbitrator be established by mutual agreement between the parties." *Bethlehem Mines Corp. v. Mine Workers*, 344 F. Supp. 1161, 1165 (W.D. Pa. 1972), *aff'd*, 494 F.2d 726 (3d Cir. 1974); *see Associated Plumbing & Mechanical Contractors v. Plumbers Local 447*, 811 F.2d 480, 483-84 (9th Cir. 1987).

Therefore, to argue its case, the unions must show—contrary to the record, App. E at 61a—that, in fact, the AAA's procedure is the practical equivalent of mutual selection of a true arbitrator.[15] The unions' only other recourse is to contend that, even assuming the AAA's procedure is **not** the practical equivalent of mutual selection, nevertheless the procedure passes muster under the First Amendment. But this Court has already decided this issue adversely to the unions, in *Hudson*, where it held that "review by a Union-selected arbitrator ... is ... inadequate" under the First Amendment. 475 U.S. at 308 (footnote omitted).

Thus, a writ of *certiorari* is unwarranted here because the factual record arguably necessary to bring the unions' procedure outside the condemnation of *Hudson* is deficient; and constitutional questions should never be decided in a factual vacuum.[16] *See, e.g., Abood*, 431 U.S. at 236 n.33. At the same time, a writ

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[15] The district court's holding that the teachers were not entitled to mutual selection was wholly gratuitous as, the unions' misrepresentations to the contrary notwithstanding, the teachers did not seek such authority. They maintain, however, that describing Petitioners' "impartial decisionmaker" process as "arbitration" is misleading and inaccurate, because it is not the product of mutual consent.

[16] This Court should wait for a case in which either "the arbitrator's selection [does] not represent the Union's unrestricted choice," *Hudson*, 475 U.S. at 308 n.21, in any sense, or in which there is a record as to whether or not a scheme such as Petitioners' amounts, in practice, to such an "unrestricted choice."

is not warranted because *Hudson* has already ruled adversely to the unions on the fundamental constitutional question.

G. Presumably because they find little support for their position in *Hudson* and in exhaustion cases, Petitioners argue that they are not attempting to impose an exhaustion requirement at all. Rather, they say, there is a ripeness problem, because "a nonmember may not bypass a union's agency fee arbitration process and then mount a First Amendment challenge to the fee." Pet. at 13. They base this argument upon the notion that "the essence of a cognizable First Amendment claim in the agency fee context is 'that a union has utilized an individual agency-shop agreement to force dissenting employees to subsidize ideological activities.'" Pet. at 15, *citing Lehnert*, 500 U.S. at 516.

This extraordinary statement is in studied disregard of the law. Petitioners' "ripeness" argument misrepresents *Hudson*. A First-Amendment violation occurs when a union spends objecting nonmembers' agency fees on nonbargaining activities. However, a violation of the right not to be deprived of property without due process **also** occurs when a union **collects** agency fees without having in place a procedure that satisfies the Constitution, in all respects, even if the union escrows all contested fees. *See, e.g., Weaver v. University of Cincinnati*, 942 F.2d 1039, 1045-46 (6th Cir. 1991).

Hudson prescribed "constitutional requirements for the Union's **collection** of agency fees." 475 U.S. at 310 (emphasis added). These requirements were not imposed merely to prevent improper spending, as the unions argue. They also were imposed to "provide the protections necessary for any **deprivation of property**" and "to minimize both the impingement [of the agency shop itself on nonmembers' First-Amendment interests] and the burden" of objection. *Id.* at 304 n.13, 309 (emphasis added).

The Court explicitly rejected the argument "that because a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly," there is no constitu-

tional violation. The Court held that the *Hudson* "plaintiffs established a constitutional violation," because the union's procedure "remains flawed in two [other] respects": the lack of "an adequate explanation for the advance reduction of dues" and "a reasonably prompt decision by an impartial decisionmaker." *Id.* at 309 & n.22.

Hudson also reiterated the Court's earlier holding in RLA cases and *Abood* that the "nonmember's 'burden' is **simply** the obligation to make his objection known." *Id.* at 306 n.16 (emphasis added). Those earlier cases also held that an objection may be made for the first time "in [a] complaint filed in [a civil] action." *Allen*, 373 U.S. at 119 n.6; *accord Abood*, 431 U.S. at 239 & n.39. And, *Hudson* emphasized that the union has "a responsibility to provide procedures that **minimize** th[e] impingement [of the agency shop on First-Amendment rights] and that **facilitate** a nonunion employee's ability to protect his rights." *Id.* at 307 n.20 (emphasis added).

It necessarily follows that a union's procedure is invalid—and a claim that the union has unlawfully collected agency fees is ripe for judicial determination—where the union's procedure fails to include one of the three required *Hudson* procedural safeguards (*i.e.*, notice, independent decisionmaker, and escrow) **or** includes some other element that imposes an impermissible condition on nonmembers' exercise of their right to challenge its calculation of chargeable expenses.

For example, under the NLRA and RLA, "the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues." *Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 n.16 (1985); *see Beck*, 487 U.S. at 744-45; *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 235-38 (1956). Thus, clearly, a union could not lawfully condition exercise of the right not to subsidize its nonbargaining activities, or the right to challenge its calculation of bargaining costs, upon full membership.

Here, Petitioners attempt to condition exercise of both rights on compliance with an aspect of full union membership: use of

a union-created remedy, *see, e.g., Neal v. System Bd. of Adjustment*, 348 F.2d 722, 726 (8th Cir. 1965). Petitioners have demonstrated no consensual or federal statutory source of authority for that requirement.

Thus, by attempting to impose that condition in its procedure, Petitioners have invalidated the procedure and infringed on the teachers' First-Amendment rights by demanding and/or collecting agency fees from them, independent of the other deficiencies already adjudicated. As the court of appeals held in *Abrams*, a union's agency-fee procedure "requiring an objector who challenges the allocation of chargeable and non-chargeable expenses to exhaust Union-provided arbitration violates its duty of fair representation by limiting the choice of forum for the challenge." 59 F.3d at 1382; *see also Bromley*, 82 F.3d at 694 ("it is [not] constitutional for an agency shop agreement to require objecting employees to exhaust their arbitration remedies before going into court on their constitutional claims"); *Hohe*, 956 F.2d at 408-09 (a state requirement of exhaustion of public-sector union agency-fee procedures "is constitutionally unenforceable").

Likewise, *Williamson County Regional Planning Commission v. Hamilton Bank*, a case Petitioners cite for this inventive argument, shows that they confuse two "conceptually distinct" questions: "whether administrative remedies must be exhausted" and "whether an administrative action must be final before it is judicially reviewable," 473 U.S. 172, 192 (1985):

> [T]he finality requirement is concerned with whether **the initial decisionmaker** has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek **review of an adverse decision and obtain a remedy** if the decision is found to be unlawful or otherwise inappropriate.

Id. at 193 (emphasis added).

Here, Petitioners are the "initial decisionmaker[s]" and "arrive at a definitive position" on the chargeability issue. When the unions distribute their notice, they have finally determined what percentage of dues they will demand of teachers who object to paying for nonbargaining activities and what they will spend, despite those objections, if the teachers do not seek review of their determination. The "impartial decisionmaker" does not participate in that decision. And, that decision "inflicts an actual, concrete injury." Dues are demanded of and/or collected from teachers based on the unions' determination, upon pain of discharge for nonpayment, thus depriving the teachers of possession of part of their wages.

On the other hand, *Hudson* describes the "impartial decisionmaker" procedure as a "review procedure" and a "remedy." 475 U.S. at 307-08 & nn.19-21. And so it is in practice. The "arbitrator" determines whether the unions validly calculated the agency fee charged objectors and orders a remedy: restitution of any portion of the fee that he finds was not lawfully collected.

Therefore, *Williamson County* confirms that the Ninth Circuit correctly held that exhaustion of Petitioners' "arbitration" procedure is not required. The claim in that case was not ripe, because the property owner had not asked the Planning Commission to grant a variance and, thus, the Commission had not yet made "a conclusive determination ... whether it would allow [the property owner] to develop the subdivision in the manner [the owner] proposed." 473 U.S. at 193. In short, in contrast to this case, there had occurred no taking or threat of taking.

However, in *Williamson County*, there were two other procedures, similar to the "impartial decisionmaker" procedure here, that the Court held need **not** be used before the claim was ripe for judicial determination. The "State provide[d] procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities." The Court held

that the property owner "would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial." It also held that the owner "would not be required to appeal the [Planning] Commission's rejection of [a] preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decision-making." *Id.*[17]

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[17] The other cases Petitioners cite are wholly inapposite. *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Poulos v. New Hampshire*, 345 U.S. 395 (1953), held merely that government can require the obtaining of a license for the use of public property if the licensing agency makes only ministerial time, place, and manner determinations. *See Poulos*, 345 U.S. at 402-05; *Cox*, 312 U.S. at 575-76. The public **owns** the public streets and parks and, as proprietor, may make reasonable regulations for their use. Petitioners have no authority over nonmembers that justifies requiring them to seek a license from it through its "arbitration" scheme as a precondition to asserting in court their constitutional and statutory right to get back their own money. Moreover, *Poulos* recognized that government cannot require the obtaining of a license as a precondition to exercising First-Amendment rights where the licensing agency—like the "arbitrator" here—has discretion to make content-based determinations. *See* 345 U.S. at 403 n.9, 412-14. *Times Film Corp. v. City of Chicago* held only that a permit may be required to protect the public "against the dangers of obscenity in the public exhibition of motion pictures," because "'obscenity is not within the area of constitutionally protected speech,'" and motion pictures are "not 'necessarily subject to the precise rules governing any other particular method of expression.'" 365 U.S. 43, 49-50 (1961) (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957), and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). Here, in contrast, the collection of agency fees even for bargaining purposes indisputably infringes on First-Amendment interests. *See Hudson*, 475 U.S. at 301 n.8, 307 & n.20; *Ellis*, 466 U.S. at 455; *Abood*, 431 U.S. at 222 (opinion of the Court), 255 (Powell, J., concurring). Nor does this case concern motion pictures.

CONCLUSION

Petitioners present no cogent reason for a writ of *certiorari* in this case. The court of appeals' decision correctly followed the applicable decisions of this Court. Petitioners suggest no conflict among the courts of appeals, and no real conflict exists. Therefore, Petitioners' petition should be denied. If a writ of *certiorari* is granted, the court of appeals' decision should be summarily affirmed.

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No. 97-1454

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ANCHORAGE EDUCATION ASSOCIATION
and NEA-ALASKA,
Petitioners,

v.

REBECCA L. PATTERSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	7

TABLE OF AUTHORITIES

CASES — Page

Air Line Pilots Association v. Miller, No. 97-428 ..... *passim*
Gilpin v. AFSCME, 875 F.2d 1310 (7th Cir.), *cert. denied*, 493 U.S. 1080 (1990) 5
Hohe v. Casey, 956 F.2d 399 (3d Cir. 1992) 4, 5
Hudson v. Chicago Teachers Union, Local 1, 922 F.2d 1306 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) 3
Lowary v. Lexington Local Board of Education, 903 F.2d 422 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990) 5
Weaver v. University of Cincinnati, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993) 5

STATUTES

Railway Labor Act, 45 U.S.C. § 151 *et seq.* 1
42 U.S.C. § 1983 ..... *passim*

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

As stated in the Petition for Writ of Certiorari ("Pet."), this case presents in the public sector the question now pending before this Court under the Railway Labor Act in *Air Line Pilots Association v. Miller*, No. 97-428. As we explained, the fact that this case arises under 42 U.S.C. § 1983, while *Miller* arose under the Railway Labor Act, was not deemed significant by the Ninth Circuit in this case or by the parties in *Miller*, and is no ground for denying certiorari. Rather, that distinction is relevant only to determining whether the most appropriate disposition upon grant of certiorari would be to remand this case to the Ninth Circuit for reconsideration, or instead to set the matter for briefing and argument in this Court. *See* Pet. 12, 15.

Although respondents devote much of their Brief in Opposition ("Opp."), to arguing the merits of requiring

"exhaustion" in a case brought under § 1983—and we respond to those arguments briefly at pp. 5-6 *infra*—respondents' principal contention is that we have "mischaracterize[d] the issue decided by the lower court," Opp. 6, because, in respondents' view, "[t]his case is not about a nonmember teacher's obligation to exhaust the unions' impartial decisionmaker process," but instead "is about a court's effort to refer damages calculations to a non-Article III decisionmaker." *Id.* There is no force to that contention.

1. The question respondents declare *not* to be presented here—"a nonmember teacher's obligation to exhaust the union's impartial decisionmaker process," Opp. 6—is precisely the question the Ninth Circuit decided.

The Ninth Circuit stated the question presented as:

> [W]hether nonmembers can be forced to arbitrate a union's chargeability determinations before seeking relief in federal court. [App. 16a]

Explaining that it "agree[d] with the [decision of the] D.C. Circuit . . . [in] *Miller*," App. 18a, the Ninth Circuit answered that question as follows:

> We therefore hold that nonmembers are not required to exhaust union remedies to which they did not agree before challenging the chargeability determinations in federal court. [*Id.*]

In the end, respondents acknowledge that the Ninth Circuit *did* decide the question presented in *Miller* and in our certiorari petition, and respondents are reduced to arguing that the court *should not have* decided that question. *See* Opp. 17 (describing what respondents characterize as "the panel's . . . error" in defining the issue to be decided). This quixotic contention ignores the true posture of the case.

The district court considered at length whether respondents should be required "to use the arbitration procedures" established by AEA to resolve chargeability objections, or whether instead "[the] court should decide chargeability issues." App. 41a. Emphasizing that it had found no

deficiencies in AEA's agency fee *procedures*, but only in certain aspects of AEA's agency fee *notice*, the district court held that respondents were not free to avoid the arbitration process and instead present their chargeability disputes in court. App. 41a-44a, 46a.[1] The district court ruled that "the arbitration procedures established by defendants . . ., utilizing the services of the American Arbitration Association . . . must be utilized by employees who wish to challenge the Associations' calculation of chargeable and nonchargeable items for the purpose of establishing service fees." App. 60a-61a. Accordingly, "all issues of chargeability for the 1992-93 year between [respondents] and [AEA], including issues raised by [respondents] herein with regard to litigation expenses, organizational maintenance and lobbying . . . shall be determined . . . through arbitration, and chargeability issues may not be brought to the court for determination until arbitration is completed." App. 61a.

What is more, the district court required arbitration for the very reasons that have been advanced in *Miller* by the petitioner and its *amici*: the court concluded that there is no proper basis for a nonmember to complain in court of a union's chargeability determinations if the nonmember has bypassed the impartial decisionmaking process established by the union to consider objections to the union's proposed charges. *See* App. 41a-46a, citing, *inter alia*, *Hudson v. Chicago Teachers Union, Local 1*, 922 F.2d 1306, 1314 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) ("Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decision-

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[1] Far from requiring arbitration *because* of the deficiencies the district court found in AEA's notice, as respondents suggest, the district court required arbitration *despite* those deficiencies. *See* App. 41a, 43a, 46a. This was unexceptional, as respondents made no showing that the deficiencies in the notice (described in the certiorari petition at 4) were such as to make arbitration unfair or inappropriate.

maker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending").[2]

Although, as respondents emphasize, the Ninth Circuit characterized the arbitration process required by the district court as involving questions of "damages" or "relief," App. 15a, 16a, that characterization did not play any part in the Ninth Circuit's analysis of the question presented. Rather, the Ninth Circuit saw this case as presenting the same issue as *Miller*, and it decided the case accordingly. *See* App. 16a-18a.

The court's perception of the issue was correct. Under the district court's order, the only matter to be arbitrated is whether AEA charged objecting nonmembers for activities that were not lawfully chargeable to them, such that the objectors would be entitled to a partial refund. *See* App. 60a-61a. (As the district court observed, respondents identified "litigation expenses, organizational maintenance and lobbying" as activities for which they allegedly had improperly been charged. App. 61a.) Such a refund would not constitute "damages" for AEA's deficient *notice*, as respondents suggest: on the contrary, an objector is entitled to a refund of the nonchargeable portion of an agency fee even if a union's notice was perfect, and "the issue of whether the notice contains a verification is irrelevant to whether the exclusive representative properly calculated the proportionate share of total chargeable expenses." *Hohe v. Casey*, 956 F.2d 399, 416 (3d Cir. 1992).

Thus, notwithstanding respondents' effort to recast this case as one involving "damage calculations," the issue

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[2] In a belabored argument, respondents make much of the fact that AEA's impartial decisionmaking process utilizes an arbitrator selected by the American Arbitration Association rather than by the nonmembers. Opp. 22-24. For the reasons that have been presented in *Miller* by the petitioner and its *amici*, respondents' attack on the use of AAA-appointed arbitrators lacks merit. In any event, this factor does not distinguish the present case from *Miller*, because the same AAA procedure was utilized in *Miller*.

decided by the Ninth Circuit is the same as the issue pending decision in *Miller*: should objections to the chargeability of particular union activities be heard by the courts if those objections were not presented to the impartial decisionmaker provided by the union.[3]

2. Respondents present a lengthy argument on the merits of whether "exhaustion" of a union's impartial decisionmaking process can be required where a nonmember has sued under § 1983. Nothing in that exegesis constitutes a ground for denying certiorari,[4] and this is not

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[3] In yet another attempt to rewrite the decision below, respondents contend that the Ninth Circuit should be understood as having determined that respondents cannot be charged *any* fee for the year at issue, Opp. 5, and therefore the need to examine AEA's chargeability determinations, whether by arbitration or in court, has been "obviated." Opp. 21. That is nonsense. The Ninth Circuit noted without disapproval that the district court had rejected respondents' claim for "a full refund of all collected fees." App. 15a. The district court's rejection of that claim was consistent with well-settled law. *See, e.g., Weaver v. University of Cincinnati*, 970 F.2d 1523, 1533-34 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *Hohe v. Casey*, 956 F.2d at 416; *Lowary v. Lexington Local Board of Education*, 903 F.2d 422, 432-33 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990); *Gilpin v. AFSCME*, 875 F.2d 1310, 1314-16 (7th Cir.), *cert. denied*, 493 U.S. 1080 (1990). Respondents would have it that the Ninth Circuit, with no discussion whatsoever, reversed the district court *sub silentio* on the "full refund" issue, parted company with the decisions of every circuit that has considered the issue, and held (again *sub silentio*) that a union must entirely forfeit the collection of agency fees, even for matters concededly germane to collective bargaining, if there was any deficiency in the union's notice for a particular year. That untenable suggestion cannot be squared with the Ninth Circuit's explicit holding that the district court's error lay in declining to adjudicate respondents' "*challeng*[*e*] [*to*] *the* [*union's*] *chargeability determinations*." App. 18a. Plainly, the court of appeals did not set the fee at zero and thus "obviate" the need for review of AEA's chargeability determinations, as respondents suggest. Rather, what the Ninth Circuit held (as the D.C. Circuit held in *Miller*) is that the union's chargeability determinations should be reviewed in the first instance by the district court rather than by an arbitrator.

[4] Respondents themselves state that "the circuits have conflicted" on the question respondents believe is presented by this case. Opp.

the time for a full response on the merits. We merely note two points.

First, none of this Court's § 1983 cases holding that exhaustion of remedies was not required involved a situation where a litigant was permitted to bypass a decisionmaking process *that a private party had been required by federal law to create in order to resolve the very dispute the litigant wished to take to court.*

Second, respondents correctly note that a union may violate constitutional requirements not only by spending objecting nonmembers' funds in a manner that improperly forces objectors to subsidize ideological activity, but also by failing to establish proper procedures for collecting agency fees. *See* Opp. 25-26. However, where a union escrows funds as required by *Hudson* and provides an impartial decisionmaking process to consider any objections to the amount the union proposes to charge, no valid First Amendment claim—whether of forced subsidization or of improper procedures—arises from collecting and spending the funds of a nonmember who fails to present an objection through the impartial decisionmaking process. *See* Pet. 14-15. Hence, the fundamental problem with respondents' position is not that respondents failed to exhaust in arbitration a First Amendment claim that otherwise would be cognizable under § 1983; it is that AEA's collection and expenditure of funds of nonmembers who did not avail themselves of the impartial decisionmaking process did not violate the First Amendment in the first place.

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19. And, on the issue framed in the certiorari petition, which respondents incorrectly maintain is not presented, respondents inexplicably assert both that "every court agrees with the Ninth Circuit," Opp. 18, and that "one court . . . has reached a contrary conclusion." *Id.*

CONCLUSION

The petition for certiorari should be granted and the case should either be remanded for reconsideration in light of *Miller* or set for briefing and argument in this Court.

Respectfully submitted,

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